86-288

No. .....

Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner,

vs.

STEPHEN R. MATTATALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

55pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A DEFENDANT'S NON-CUSTODIAL, VOLUNTARY, UNSOLICITED, AND UNCOUNSELLED STATEMENT TO A PRIVATE CITIZEN WHO WAS NOT A GOVERNMENT AGENT MUST BE SUPPRESSED AS VIOLATIVE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL, IN A SITUATION WHERE THE POLICE PLAYED AN ENTIRELY PASSIVE ROLE AND MERELY OVERHEARD THE DEFENDANT'S STATEMENT AS A RESULT OF HAPPENSTANCE?

II. WHETHER THE FOURTH AMENDMENT EXCLUSIONARY RULE MAY BE INVOKED TO SUPPRESS A DEFENDANT'S INCRIMINATORY STATEMENTS WHERE NO COURT HAS EVER MADE A DETERMINATION THAT THE DEFENDANT'S DETENTION WAS VIOLATIVE OF THE FOURTH AMENDMENT?

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Now comes the State of Rhode Island and Providence Plantations, (hereinafter referred to as the State) by its attorney, and prays that this Honorable Court issue a writ of certiorari to the Supreme Court of Rhode Island to review said court's erroneous decision of two federal constitutional questions.

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OPINION OF THE COURT BELOW

The case at bar was decided by the Rhode Island Supreme Court in a decision reported as *State v. Stephen R. Mattatall,* 510 A.2d 947 (R.I. 1986). The opinion is reprinted in full at appendix pages 1 through 12.

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STATEMENT OF JURISDICTION

The judgment of the Rhode Island Supreme Court entered on June 9, 1986. A petition to reargue was timely filed on June 13, 1986, and denied by the court in an order dated June 26, 1986. The petition to reargue and accompanying memorandum are set out in full at appendix pages 13 to 24. The order denying reargument is set out at appendix page 25.

Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257(3), and by the Rules of the Supreme Court of the United States, R. 17.1(b)(c).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the following statutory and constitutional provisions involved in this case are set out beginning at appendix page 26:

U.S. Const. Amend. IV

U.S. Const. Amend. VI

U.S. Const. Amend. XVI, § 1

R.I. Gen. L. 11-1-1

R.I. Gen. L. 11-47-5

STATEMENT OF THE CASE

This case involves the murder of John Scanlon on September 24, 1982, in the City of Warwick, Rhode Island. A Kent County Superior Court jury convicted the Respondent, Stephen R. Mattatall (hereinafter referred to as "defendant") of second degree murder. The trial judge sentenced defendant to forty years' imprisonment of which ten years was suspended. An additional ten years was imposed pursuant to the habitual offender statute. The Rhode Island Supreme Court reversed defendant's conviction on two grounds. *State v. Mattatall*, 510 A.2d 947 (R.I. 1986). The court concluded that the trial judge had erred in denying two separate suppression motions filed by the defendant. The state court's opinion is set out beginning at page 1 of the appendix hereto.

Factual Background. On the evening of September 23, 1982, John Scanlon received a telephone call from de-

fendant. As a result of this call, Scanlon went to defendant's house to meet with the defendant. The next morning, defendant's wife found Scanlon shot to death on the defendant's kitchen floor. As a result of a call to the police from defendant's neighbor, Warwick police responded to the scene of the killing. A .22 calibre weapon was found on the floor next to the victim. Subsequent balistic tests, however, revealed that the fatal bullet was not from the .22, but from a .357 that had been purchased earlier in the year by the defendant's sister.

Statements to Police. After the police arrived at defendant's home, the defendant emerged from an upstairs bedroom. He looked at the victim's body and stated that he should not have shown the victim the gun the night before. According to the police testimony, defendant was in an agitated state. Believing the defendant to be a significant witness with regard to the shooting, the Warwick police transported him to headquarters for the purpose of questioning. The police did not consider the defendant to be under arrest at this point. Although defendant never gave a written statement, he made several oral statements to the Warwick police. During the course of his stay at headquarters, defendant first suggested that Scanlon had committed suicide with the .22 weapon. When confronted with a question regarding the .357 as opposed to the .22, defendant changed his version and described the killing as an accident. These oral statements became the subject matter of a motion to suppress. Defendant argued that the statements were the fruits of an unlawful arrest and were therefore violative of this Court's decision in *Dunaway v. New York*, 442 U.S. 200 (1979). Finding that the defendant was not under arrest at the time that

he made these statements, the trial judge therefore denied the defendant's motion to suppress without addressing the issue of probable cause.

Statements to Private Individual. In addition to the statements made to the police officers, defendant also made statements to an acquaintance named John Carney. On December 26 and 27, 1982, the defendant telephoned Carney and spoke with him regarding the death of John Scanlon. Carney had previously received threatening phone calls from the defendant, and at the time of the December 26 and 27 calls, members of the Warwick Police Department were at Carney's home investigating these threats. During the course of these calls, defendant made statements indicating that Scanlon's death was not suicide and that the defendant and Scanlon had been alone at the time of the shooting. At Carney's request, because Carney anticipated that the calls might involve further threats, the Warwick police officers listened on an extension phone. There was no evidence that Carney was a police agent or informant. On all occasions, the calls were initiated by the defendant. Carney testified that no one had instructed him to discuss the Scanlon shooting. Finding that on each occasion it was the defendant, not Carney, who initiated the calls and brought up the subject of Scanlon's death, the trial judge rejected defendant's Sixth Amendment motion to suppress the uncounselled statements to Carney.

Opinion of the Rhode Island Supreme Court. Based upon the physical evidence and his contradictory statements, the defendant was convicted of second degree murder. On appeal, the Rhode Island Supreme Court held that the trial judge had erred in denying defendant's motions

to suppress. With regard to the Sixth Amendment issue, the court found a rule of *per se* exclusion in this Court's decision in *Maine v. Moulton,* 106 S. Ct. 477 (1985). Because the statements to Carney were made in the absence of counsel, the Rhode Island court deemed them inadmissible *per se,* without any analysis of the nature of the police conduct. The State submits that this holding is clearly contrary to this Court's decision *Moulton* and the more recent decision in *Kuhlman v. Wilson,* 91 L. Ed. 2d 364 (1986). Accordingly, a writ of certiorari should issue to correct this error.

With regard to the Fourth Amendment issue, the state court found that the trial justice had erred in concluding that defendant was not under arrest at the time the statements were made. Having found an arrest, however, the court "assumed without deciding" that the police lacked probable cause for the arrest. The court based this assumption on the tautological theory that the police did not believe that defendant was under arrest and that they therefore must have lacked probable cause. Thus, without any court having determined that the defendant's arrest was unlawful, the Rhode Island Supreme Court invoked the Fourth Amendment exclusionary rule to suppress defendant's statements. The State submits that, having found defendant to be under arrest, the Rhode Island Supreme Court was required to undertake a probable cause analysis to determine whether that arrest was lawful. The lack of such an analysis renders the court's application of the exclusionary rule erroneous. This court should grant certiorari in order to address the question whether a court may invoke the exclusionary rule without ever having addressed the legality of a defendant's detention.

ARGUMENT

I. THE RHODE ISLAND SUPREME COURT ERRONEOUSLY APPLIED THE SIXTH AMENDMENT EXCLUSIONARY RULE TO VOLUNTARY, UNSOLICITED STATEMENTS OF THE DEFENDANT MADE TO AN ACQUAINTANCE.

On December 26 and 27, 1982, the defendant telephoned a friend, John Carney, and spoke with him regarding the death of John Scanlon. Carney had previously received threatening phone calls from the defendant, and at the time of the December 26 and 27 calls, members of the Warwick Police Department were at Carney's home investigating these threats. During the course of these calls, defendant made certain statements of an incriminating nature. There was no evidence that Carney was a police agent or informant. Carney testified that no one has instructed him to discuss the Scanlon shooting. Indeed, the trial judge specifically found that on each occasion it was the defendant, not Carney, who brought up the subject of Scanlon's death. In particular, at the close of the pre-trial suppression hearing, the court made the following factual finding:

> [THE COURT:] Mr. Carney testified, it was uncontradicted, that he had called the police to his home for protection. That's what the police were there for because of the threats Mr. Carney had allegedly received. While they were there, the phone rang. Mr. Carney answered and asked the police officer to listen in.
>
> This defendant has no right of privacy on a telephone call when he makes it outside. This telephone call was made to Mr. Carney. It was not made by Mr. Carney. There is no evidence on the record that

there is any suggestion by the police as to what Mr. Carney should say, or how he should direct the conversation, or that he should raise the issue of the Scanlon shooting. There was nothing at all. *The police role was entirely passive.* They listened. They gave no instruction.

Mr. Carney stated clearly he was not acting for the police. He had the police in his house for purposes of protection. They were not there to listen in on his telephone calls, but because of the threats he had received, he wanted the police to listen to see who was on the phone and what was being said, and *it was this defendant who brought up the Scanlon issue.* It wasn't Mr. Carney.

Tr. at 277-78. Based upon the foregoing factual findings, the trial judge denied the defendant's various motions to suppress the statements made to Carney.

Despite the clear findings that "the police role was entirely passive," the Rhode Island Supreme Court found error in the admission of the defendant's statements to Carney. The court concluded that suppression was mandated by this Court's resent decision in *Maine v. Moulton*, 106 S. Ct. 477 (1985). The Rhode Island court apparently interpreted *Moulton* to require exclusion of *any* uncounselled statements overheard by the police, regardless of the nature of police involvement or the factual circumstances surrounding the statement. Once the right to counsel had attached, the court reasoned, a defendant's overheard uncounselled statements are totally unavailable for use at trial:

There is no question that the Sixth Amendment right to counsel was applicable in this case, that counsel had entered an appearance in the case, that the police knew or were chargeable with knowledge of this set

> of facts, and that they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. However justifiable it may have been for the police to take this action for the purpose of investigating other criminal conduct, *the plain message of Moulton is that the prosecution may not use evidence obtained regarding the pending charges against the defendant at his trial.* Whether the police use a telephone, an electronic device, or a jailmate to obtain this information is not controlling. The doctrine established by the Supreme Court of the United States requires that such information not be used in evidence against the defendant on the charge in respect to which the right to counsel has previously attached.

App. at 11-12, 510 A.2d at 953.

The State respectfully suggests that the Rhode Island Supreme Court has erred in its interpretation of the holding of *Moulton.* First, the Court in *Moulton* specifically stated that "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached." 106 S. Ct. at 487. In a footnote, this Court suggested that in order to prevail on a suppression motion, the defendant must demonstrate that "the State 'must have known' that *its agent* was likely to obtain incriminating statements from the accused . . ." *Id.* n. 12 (emphasis added). Thus, *Moulton* strongly implies that suppression will be unavailable when the defendant is conversing with someone other than a police agent.

Moreover, this Court's recent decision in *Kuhlman v. Wilson,* 91 L. Ed. 2d 364 (1986), clearly demonstrates that the Rhode Island Supreme Court has erred in its application of the Sixth Amendment. In *Wilson,* the de-

fendant, who was under arrest for robbery and murder, was deliberately placed in a prison cell with a police informant. Defendant had initially told the police that he was present at the scene of the crime, but he denied that he knew the perpetrators or that he had participated in the crime. The prison cell informant agreed to report any incriminating admissions to the police. The police specifically instructed the informant not to ask defendant any questions, but simply "to keep his ears open." *Id.* at 372. Defendant initially told the informant the same story he had told the police. In response to this story, the informant told defendant that he had "better come up with a better story than that because that one doesn't sound too cool . . . " *Id.* n.1. Thereafter, defendant gradually changed his version to an admission that he had planned and participated in the robbery and murder. Based upon this set of facts, the United States Court of Appeals for the Second Circuit held that the defendant's statements had been obtained in violation of his Sixth Amendment right to counsel. *Id.* at 374 (citing *Wilson v. Henderson,* 742 F.2d 741 (2d Cir. 1984)). This court granted certiorari and reversed. The Court reasoned that the defendant's statements to the informant had been "spontaneous" and "unsolicited." *Id.* at 385:

> [A] defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 384-85. Because the defendant in *Wilson* had failed to make this showing, this Court held that suppression of the incriminating statements was inappropriate.

Measured against the law as applied in *Moulton* and *Wilson,* the Rhode Island Supreme Court clearly committed error in the instant case. In this case, the Warwick police played no role whatsoever in the exchange of communication between Carney and the defendant. Carney was neither a police agent nor paid informant, but an individual private citizen who considered himself in some danger. The calls themselves were initiated by defendant, and it was he, not Carney, who brought up the topic of the Scanlon shooting. Carney's conduct can scarcely be considered interrogation. Moreover, the presence of the police was happenstance and was justified by independent need to investigate the threats to Carney. The trial judge specifically found the role of the officers to have been a "passive" one.

In sum, under the law enunciated in *Moulton* and *Wilson,* the Rhode Island Supreme Court erred in finding a Sixth Amendment violation. This Court should grant a writ of certiorari in order to correct that error.

II. IN A CASE WHERE NO COURT HAD EVER DETERMINED THAT DEFENDANT'S ARREST WAS UNLAWFUL, THE RHODE ISLAND SUPREME COURT ERRED BY INVOKING THE FOURTH AMENDMENT EXCLUSIONARY RULE TO SUPPRESS A DEFENDANT'S VOLUNTARY STATEMENT.

A. *Introduction.* This case presents a significant question with regard to the administration of the Fourth Amendment exclusionary rule. The issue presented is

whether the Fourth Amendment exclusionary rule may be invoked to suppress a defendant's incriminatory statements where no court has ever made a threshold determination that the defendant's detention was unlawful. At the pre-trial suppression hearing in Kent County Superior Court the trial judge never addressed the issue of probable cause, concluding instead that the defendant was not under arrest at the time of the interrogation. The Rhode Island Supreme Court reversed. Reasoning that a so-called investigory detention amounted to a seizure for Fourth Amendment purposes, the court reversed based upon this Court's decision in *Dunaway v. New York,* 442 U.S. 200 (1979). In reaching this conclusion, however, the Rhode Island court "assumed without deciding" that the police lacked probable cause to arrest the defendant. App. at 4, 510 A.2d at 950. The State submits that such an assumption is neither consistent with the cases decided by this Court nor with the purposes and goals of the Fourth Amendment exclusionary rule. The rule provides for the suppression of a defendant's otherwise voluntary statement when three specific criteria are met. First, the defendant must have been "seized" as that term is defined for Fourth Amendment purposes. Second, the seizure must be violative of the Fourth Amendment's proscription against unreasonable searches and seizures. And finally, the statement itself must be a "fruit" of the seizure.

The State respectfully suggests that this three step analysis is a necessary prerequisite to Fourth Amendment exclusion. In the instant case, however, the Rhode Island Supreme Court applied the exclusionary rule without addressing the second—and pivotal—point of the analysis. The court never analyzed to determine whether

the police had probable cause at the time that defendant was seized. This fatal flaw renders the Rhode Island court's reasoning erroneous and warrants exercise of this Court's certiorari jurisdiction.

B. *The Fourth Amendment Exclusionary Rule.* In *Weeks v. United States*, 232 U.S. 383 (1914), this Court held that evidence obtained in violation of a defendant's Fourth Amendment rights may not be used as evidence against the defendant in a federal[1] criminal prosecution. *Id.* at 393-94. Nearly three-quarters of a century has passed since the Court's first announcement of the *Weeks* exclusionary rule. In that time this Court has refined the application of the rule in many regards. The *Weeks* rule—which appeared originally only to exclude the particular pieces of improperly seized evidence—was quickly explained by Justice Holmes to require suppression of follow-up evidence gained by exploitation of the initial illegality:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the government's own wrong cannot be used by it in the way proposed.

Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). After *Silverthorne*, in the words of Justice

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[1] In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court held that the *Weeks* exclusionary rule applies with equal force in state criminal proceedings. *Id.* at 654-55.

Frankfurter, the *Weeks* exclusionary rule prohibited the government from introducing not only the illegally seized evidence itself, but also any evidence that was "a fruit of the poisonous tree." *Nardone v. United States,* 308 U.S. 338, 341 (1939). The Court further refined the "fruit of the poisonous tree" analysis in *Wong Sun v. United States,* 371 U.S. 471 (1963). In *Wong Sun* the Court clearly stated that the exclusionary rule will not preclude the fruits of illegal conduct in situations where intervening events have "purged the taint" of initially unlawful conduct:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 488 (citation omitted); *see id.* at 491-92 (although defendant's arrest was illegal, defendant's statement should not be excluded because intervening events served to attenuate the taint of the initial illegality).

C. *Limitations on the Exclusionary Rule.* Without wavering from the efficacy of the Fourth Amendment exclusionary rule, this Court has on occasion recognized that the philosophical underpinnings of the rule will not always support the rule's application in certain circumstances. For example, in *Walder v. United States,* 347 U.S. 62 (1954), the Court held that the exclusionary rule does not preclude a prosecutor from using illegally seized evidence for the limited purpose of impeaching the credi-

bility of a defendant who testifies in his own defense. *Id.* at 65 ("there is hardly a justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the government's disability to challenge his credibility."). Similarly, in *United States v. Calandra*, 414 U.S. 338 (1974), the Court held that the Fourth Amendment exclusionary rule does not preclude the use of unlawfully obtained evidence in grand jury proceedings. *Id.* at 351-52. In reaching this conclusion, the Court reasoned that the purpose of the rule—deterring police misconduct—would not justify suppression at the grand jury stage of criminal proceedings. *See id.* at 351 ("Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best."). This Court described a further limitation on the application of the rule in *Stone v. Powell*, 428 U.S. 465 (1976). *Powell* involved the availability of the Fourth Amendment exclusionary rule as a basis for a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. This Court held that the exclusionary rule should not be available to a habeas petitioner seeking collateral review of state court convictions, so long as the state court system provided the petitioner with an opportunity to assert his Fourth Amendment claim. In reaching this conclusion, the Court undertook a risk-utility analysis:

> Application of the [exclusionary] rule . . . deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in

> part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.

Id. at 490-94 (footnotes omitted). More recently, the Court has recognized a "good faith exception" to the exclusionary rule that applies to permit the use of illegally seized evidence in situations where the police relied in good faith upon a warrant. *United States v. Leon,* 104 S. Ct. 3404 (1984). In finding a good faith exception, the Court in *Leon* again balanced the utility of the exclusionary rule against the heavy societal costs attendant to the rule's application:

> The substantial societal costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of government rectitude would impede unacceptably the truth-finding functions of judge and jury." . . . An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system . . . Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and the administration of justice."

Id. at 3413 (footnotes and citations omitted).

This Court has clearly expressed concern for the proper administration of the Fourth Amendment exclu-

sionary rule. Despite the Court's consistent adherence to the principles of deterrence embodied in the rule, the Court has specifically declined to permit the rule to be used in a manner that perverts the ends of justice. The Court's decisions in *Leon, Powell, Calandra,* and *Walder* all demonstrate this Court's concern that the rule be applied in a logical and reasonable manner in order to avoid an indiscriminate application and to assure "the idea of proportionality that is essential to the concept of justice." *Powell, supra.*

D. *The Rhode Island Supreme Court erroneously excluded the defendant's statement under the Fourth Amendment exclusionary rule.* This Court has applied the exclusionary rule in several cases to suppress a voluntary statement that was obtained in violation of a defendant's Fourth Amendment rights. In *Brown v. Illinois,* 422 U.S. 590 (1975), this Court held that the Fourth Amendment exclusionary rule may operate to bar the admissibility of a defendant's statement even when the statement is voluntary and the interrogating officers have fully complied with the rule of *Miranda. Id.* at 603-04. In *Brown,* police officers who were investigating a homicide undertook to "interview" all of the victim's acquaintances, including defendant Brown. *Id.* at 592. Without a warrant or probable cause, police officers broke into Brown's apartment, conducted a thorough search, and arrested defendant Brown. *Id.* During a subsequent interrogation, Brown voluntarily waived his *Miranda* rights and admitted his involvement in the homicide. *Id.* at 594-95. This Court, although recognizing that an individual who is under illegal arrest may nevertheless consent to interrogation, *id.* at 603, rejected the contention that proper *Miranda* warnings alone are sufficiently purgative of the threshold illegal-

ity to dissipate the taint of the original police misconduct. Instead, the Court in *Brown* concluded that a proper analysis focuses upon several factors:

> The question whether a confession is the product of free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. . . . The voluntariness of the statement is a threshold requirement.

Id. at 603-04 (citations and footnotes omitted). The Court concluded on the facts of *Brown* that there were no "intervening events of significance," *id.* at 604, between the time of the illegal arrest and interrogation. Thus, the *Brown* Court found nothing of a purgative nature that would render the statement admissible.

The Court in *Dunaway v. New York*, 442 U.S. 200 (1979), held that the rule of *Brown* applies with equal force in cases where police take an individual into custody for "investigative" purposes. Thus, even in situations where a suspect is not under formal arrest, his statement may be suppressed if the police lacked probable cause at the time of the detention. *Id.* at 211-14. In reaching this result, the Court in *Dunaway* described probable cause as

"the threshold standard . . . for Fourth Amendment seizures . . . " *Id.* at 213. More recently, however, in *Florida v. Rodriguez,* 105 S. Ct. 308 (1984), the Court reiterated the view that in certain limited circumstances, an individual may be detained without probable cause for investigatory questioning:

> Certain constraints on personal liberty that constitute "seizures" for purposes of the Fourth Amendment may nonetheless be justified even though there is no showing of "probable cause" if "there is articulable suspicion that a person has committed or is about to commit a crime." . . . Such a temporary detention for questioning in the case of an airport search is reviewed under the lesser standard enunciated in *Terry v. Ohio,* . . . and is permissible because of the "public interest involved in the suppression of illegal transactions in drugs or of any other serious crime."

Florida v. Rodriguez, 105 S. Ct. at 310 (citations omitted).

The foregoing cases demonstrate that three fundamental questions that must be answered in determining whether the Fourth Amendment exclusionary rule will operate to suppress the admissibility of a defendant's statement. First, the defendant must be under arrest as that term is defined for Fourth Amendment purposes. *Dunaway* and *Rodriguez,* both *supra.* Second, the arrest or custody must be unreasonable. That is, at the time of the initial detention, the police must lack probable cause for the defendant's arrest. *Dunaway v. New York,* 442 U.S. at 213 (probable cause is "threshold standard" for determining reasonableness of fourth amendment seizure). Finally, the defendant's statement must be a "fruit" of the unlawful arrest, under the test enunciated in *Wong Sun* and *Brown.*

Of these three essential prerequisites for application of the exclusionary rule, the State submits that second is the most significant. *Weeks* and its progeny flow from the Fourth Amendment. A detention that does not violate the Fourth Amendment simply cannot form the basis for operation of the *Weeks* exclusionary rule. Indeed, in *Brown* itself, the Court specifically described "the purpose and flagrancy of the official misconduct," as an essential consideration in determining whether the defendant's statement was a product of the impermissible detention. 422 U.S. at 603. Thus, the exclusionary rule will be of no force whatsoever if the police acted within the bounds of Fourth Amendment reasonableness in arresting the defendant. If the police acted upon probable cause, the exclusionary rule need not apply because "there is no police illegality and thus nothing to deter." *United States v. Leon*, 104 S. Ct. at 3420. A court that applies the rule must therefore be duly sensitive in analyzing the reasonableness of the detention. To do otherwise would constitute an "indiscriminate" application of the exclusionary rule and would run the risk of "generating disrespect for the law and the administration of justice." *Stone v. Powell, supra.*

In the instant case the trial court found that the defendant was not in custody for Fourth Amendment purposes. The trial judge therefore never addressed the issue of probable cause. The Rhode Island Supreme Court, after concluding that the trial judge had erred in his decision regarding custody, nevertheless declined to address the pivotal issue of probable cause. Instead, the court "assumed without deciding" that the police lacked prob-

able cause at the time of defendant's arrest. App. at 4, 510 A.2d at 950. The apparent basis for this fundamental gap in the court's application of the exclusionary rule was the tautological conclusion that the police did not believe that they were arresting the defendant and that, therefore, they must not have had probable cause to arrest. Thus, rather than undertaking the task of determining whether the defendant's arrest was supported by probable cause, the Rhode Island Supreme Court chose instead to base its holding on the subjective belief of the officers who testified at the suppression hearing.

This logic, turning as it does on the subjective belief of the police officer, is fatally flawed for obvious reasons. This Court has held on numerous occasions that the existence of probable cause is an objective question. *E.g. Draper v. United States*, 358 U.S. 307, 313 (1951) (promulgating "reasonable man" standard for probable cause); *Brown v. Texas*, 443 U.S. 47, 51-53 (1979) (reasonableness of detention must rest on objective criteria). To hold otherwise would assign the critical notion of probable cause to the subjective discretion and control of each and every police officer who conducts a search or executes an arrest. Although some critics of the exclusionary rule might welcome such a development, it clearly runs counter to the decisional law of this Court.

The State readily acknowledges that based upon the record that was before the Rhode Island Supreme Court, the burden of establishing probable cause in this case is not an easy one. Of course, as this Court has stated, in demonstrating probable cause, the State's burden is considerably less stringent than proof beyond a reasonable doubt. Rather, the State need establish "only the prob-

ability, and not a prima facie showing, of criminal activity." *Illinois v. Gates*, 103 S. Ct. 2317, 2330 (1983) (citations omitted). Measured in this context, the State respectfully suggests that ample information is present upon this record to support a finding of probable cause.

First, the Warwick police had received a report regarding a shooting. Upon responding to the scene, police officers found a man dead on the floor lying in a pool of blood. The sole (living) occupant of the home was the defendant, whom the police observed to be in a somewhat agitated state. In the presence of police, defendant made a spontaneous and unsolicited statement to the effect that he had supplied the weapon to the deceased. This information clearly supported a conclusion by the officers that the defendant had possessed a firearm[2] and that he had, at least, aided and assisted a suicide.[3] Although this infor-

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[2]R.I. Gen. L. § 11-47-5 prohibits any person previously convicted of a crime of violence from possessing a firearm. In the instant case, defendant was charged with two counts of violating this statute. These counts were severed from the murder charge and remain to be tried. One of the Warwick police officers at the scene of the homicide prior to defendant's arrest testified that he knew of defendant's prior contacts with the police. Knowledge of the defendant's prior convictions would undoubtedly have been within the collective knowledge of the police. Thus, at the time of defendant's transportation to police headquarters, police undoubtedly had probable cause to arrest defendant for violating § 11-47-5.

[3]Defendant's admission that he supplied the weapon to a potential suicide victim would clearly supply probable cause for the common law crime of aiding a suicide:

> It has been ably argued that suicide was murder by the English common law. But whether it is to be regarded as murder, or a separate but similar offense, there is no dispute that suicide, as were explained, was a felony.

(Continued on following page)

mation alone might not constitute proof beyond a reasonable doubt, the State respectfully submits that it rises to the level of "the probability . . . of criminal activity." *Gates, supra.* On such a record, the State submits, the Rhode Island Supreme Court erred in failing to undertake any review for the presence of probable cause. Without such a determination, application of the exclusionary rule by the court can only be described as "indiscriminate." *Stone v. Powell, supra.*

The State respectfully submits that based upon this Court's prior decisions, the Rhode Island Supreme Court was required to make a specific finding on the issue of probable cause prior to invoking the exclusionary rule. The failure to do so constitutes error. This court should grant a writ of certiorari to correct that error.

(Continued from previous page)

Because of this fact an attempt to commit suicide was a misdemeanor. One who encouraged another to commit suicide was guilty of a felony as a principal if he was present at the act which caused the death, and as an accessory before the fact if he was not present when the fatal act was committed.

R. Perkins, *Criminal Law* at 83 (2d Ed. 1969); *see generally* 40 Am. Jur. 2d § 585, at 845-47 (modern jurisdictions differ as to nature of culpability of individual who aids or abets suicide). Although it would not appear that Rhode Island has ever prosecuted for aiding a suicide, the legislature clearly provided that any offense that was criminal at the common law may be punished as a criminal offense under Rhode Island law. R.I. Gen. L. § 11-1-1.

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CONCLUSION

The State submits that the Rhode Island Supreme Court erred in its suppression of the defendant's statements. The court erroneously applied the Sixth Amendment to statements that were made to a private individual and overheard by the police as a result of happenstance. Certiorari should be granted on this issue, because the Rhode Island Supreme Court has decided a federal question "in a way in conflict with applicable decisions of this court," R. 17.1(c). With regard to the Fourth Amendment issues, the Rhode Island Supreme Court suppressed defendant's statements without ever determining that the police had illegally arrested the defendant. This constitutes an erroneous application of the Fourth Amendment exclusionary rule. The State submits that the within petition for certiorari should be granted because the Rhode Island Supreme Court's decision conflicts with applicable decisions of this Court, and because this question "has not been, but should be, settled by this Court . . ." *Id.*

Respectfully submitted,

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

By its Attorneys

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

APPENDIX

June 9, 1986

Supreme Court
No. 85-149-C.A.

State

v.

Stephen R. Mattatall.

OPINION

WEISBERGER, J. This case comes before us on the defendant's appeal from a judgment of conviction of second-degree murder entered after a jury trial. Thereafter, the trial justice denied the defendant's motion for new trial and sentenced him to a term of forty years' imprisonment of which ten-years were suspended. The trial justice further imposed an additional ten year sentence upon the defendant, Stephen R. Mattatall, as a habitual offender. We reverse the conviction. The facts of the case insofar as pertinent to this opinion are as follows.

On the morning of September 24, 1982, defendant's wife found the body of John Scanlon on the kitchen floor of the Mattatalls' Warwick dwelling. Scanlon had apparently been shot in the face. A .22-caliber pistol was visible beneath the body. Doctor Loren J. Mednick, an assistant medical examiner for the state, later found that Scanlon had died between midnight and 4 a.m. on September 24, 1982, by reason of a fatal gunshot wound to the cheek.

At about 9:15 a.m. Sergeant Ernest Pierce of the Warwick police department arrived at the Mattatall home and observed that defendant was extremely agitated. The ser-

geant, admonishing defendant to sit down on the couch, asked him some questions about the .22-caliber gun but received no definitive reply. At this point Lieutenant James J. Goodbout, who was in charge of the investigation, instructed Sergeant Pierce to have Mattatall transported to police headquarters in order to further the investigation as well as to get statements from Mattatall. Lieutenant Godbout testified that Mattatall was not at liberty to refuse his removal to the police station and presumably was not free to depart from the station until the investigative interrogation had been completed. Patrolman Ernest Heon drove defendant to the station in a police cruiser and then led him into an interrogation room within the detective division.

In the interrogation room Detective Johnson admonished defendant of his *Miranda* rights at about 11 a.m. on September 24, 1982. In response to these admonitions, defendant declined to sign a waiver-of-rights form. Detective Johnson continued to question Mattatall, who informed the detective that he and Scanlon had been drinking together, that the .22-caliber gun was not owned by defendant, but that defendant did own a .357-magnum pistol. The defendant suggested that Scanlon had committed suicide. After about fifteen or twenty minutes of interrogation defendant told Detective Johnson that he no longer wished to discuss the matter with him.

Lieutenant Godbout returned to the police station and brought defendant to a larger interview or interrogation room. The lieutenant advised defendant of his *Miranda* rights against at about 12:30 p.m., and Mattatall signed a waiver-of-rights form at that time. Mattatall stated that he and Scanlon had been drinking the night before

and that Scanlon had asked him if he owned a gun. The defendant stated that he gave Scanlon a .22-caliber gun with a single bullet and then went upstairs to bed. Thereafter, when defendant refused to sign a consent form to allow a neutron-absorption test to be administered, a warrant was obtained to perform this test in order to determine whether defendant had recently fired a gun. The test was performed and concluded at about 3 p.m. The results were negative. Thereafter, Lieutenant Godbout continued his interrogation, and Mattatall admitted that he owned a .357 magnum as well as the .22-caliber gun. The defendant refused to tell the police where the magnum was located but signed a consent form allowing the police to search his home for the gun.

At this point, defendant became more and more agitated, began to cry, and then stated that he was showing Scanlon how to work the .22-caliber gun, and that it had accidentally discharged, and struck Scanlon in the face. Lieutenant Godbout then asked defendant why he had not called the rescue squad or the police at that point. Mattatall replied that he had nothing further to say. At this point questioning was terminated, and defendant was allowed to call his attorney. Statements taken during the course of this interrogation were introduced into evidence during the trial after a motion to suppress was denied. During the suppression hearing the prosecution took the position that since Mattatall was not under arrest when he was taken to the station and was not a suspect at that time, it was unnecessary to establish probable cause in order to justify his transportation to police headquarters and his seizure or custody for investigative purposes. The trial justice agreed that Mattatall was not arrested. No

ruling was requested or made on the issue of probable cause for the detention.

Certain statements made by defendant to one John Carney after Mattatall had been arraigned and after counsel had entered an appearance on behalf of defendant also were admitted during the course of the trial. More details concerning these statements will be set forth later in this opinion. It is sufficient at this point to indicate that the conversations between defendant and Carney were overheard by the police with Carney's consent.

In support of his appeal defendant raises seven issues, only two of which will be dealt with in this opinion. Further facts will be supplied as necessary in dealing with these issues.

I

For purposes of this opinion, the court must assume that at the time Mattatall was ordered to be transported to Warwick police headquarters, the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide, or indeed that a homicide had been committed. Their purpose in transporting Mattatall to the police station was investigative only. They did not suspect him of homicide or murder. Such suspicion arose later because of defendant's responses to interrogation, together with the finding of a .357 magnum in a stream near Mattatall's house and certain ballistic findings concerning the fact that the gunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had

no probable cause to believe that he was guilty of a crime. The purpose of this removal was investigative and was not considered by the police to be a full custodial arrest. The arrest took place later at the police station after Mattatall made certain statements that he might have intended to be exculpatory but which led the police to believe that he was involved in a homicide. We shall also assume for the purpose of this opinion that defendant was properly admonished of his *Miranda* rights and that his responses to interrogation were voluntary as found by the trial justice.

The Supreme Court of the United States has unequivocally held in a series of opinions that the fruits of an illegal seizure or detention are inadmissible in evidence, whether obtained by interrogation or otherwise. *Taylor v. Alabama,* 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982); *Dunaway v. New York,* 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *Brown v. Illinois,* 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *Davis v. Mississippi,* 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969); *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The foregoing cases establish the principle that if a person is detained in violation of the rights guaranteed by the Fourth Amendment to the Constitution of the United States, any fruits of the illegal detention are inadmissible even if they are oral statements, as in *Taylor, Dunaway* and *Brown,* for which adequate *Miranda* warnings had been given for Fifth Amendment purposes. It was also established in *Davis v. Mississippi,* as well as in *Taylor v. Alabama,* that the taking of fingerprints during

such an illegal detention will result in the exclusion of these prints from evidence.

The state argues that since Mattatall was not under full custodial arrest, his statements, if given voluntarily, should be admissible. This argument was presented in *Dunaway v. New York, supra,* and was rejected. In that case the Court observed, after contrasting such investigative detention from the brief investigative stop approved in *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), as follows:

> "[T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes * * * obviously do not make petitioners seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* [*v. Ohio,* 392 U.S. 1 (1968)] and its progeny. Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway,* 442 U.S. at 212-13, 99 S. Ct. at 2256-57, 60 L. Ed. 2d at 835-36.

The Court, in *Dunaway,* rejected the same distinction between investigation and accusation that it had rejected

ten years earlier in *Davis v. Mississippi, supra.* In *Davis,* a young man, along with forty or fifty other black youths, was detained at a police station incident to a rape investigation, was fingerprinted, and was then released. No probable cause was established for the seizure and detention of Davis. The state argued that Davis was not arrested but only detained briefly for investigative purposes with a minimum intrusion during the course of fingerprinting. The Court responded with this statement:

> "[T]o argue that the Fourth Amendment does not apply to the investigatory stage if fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis,* 394 U.S. at 726-27, 89 S. Ct. at 1397, 22 L. Ed. 2d at 680-81.

There seems no question that in the case at bar defendant was seized for Fourth Amendment purposes and was detained for a substantial period of time during which he was interrogated. There is no question that the fruits of this interrogation assisted in the establishment of probable cause for his arrest and were used against him at the trial in order to obtain his conviction.

This court has had occasion to consider such detention in *State v. Bailey,* 417 A.2d 915 (R.I. 1980). In that case, we established the criteria for determining whether an arrest or seizure has taken place for Fourth Amendment purposes. These factors included: "[1] the extent

to which the person's freedom of movement has been curtailed and the degree of force used by the police * * * [2] the belief of a reasonable innocent person [concerning his/her inhibition of movement] in the same circumstances * * * and [3] [the question of] whether the person had the option of not going with the police * * *." *Id.* at 917-18. Applying these factors to the instant case, one is compelled to conclude that Mattatall's freedom of movement was curtailed, certainly from the moment that Lieutenant Godbout ordered that he be transported to the police station. Mattatall did not have the option of declining to go with the police. Moreover, the fact that there were a number of police officers at the scene would have caused a reasonable person to conclude that he was subject to official restrains. Although the police did not use physical force upon defendant and did not handcuff him, they did act under color of authority and under circumstances that would cause a reasonable person to conclude that refusal to accompany them would be ineffective.

Taking into account the relevant authorities cited above, we are of the opinion that the oral statements made by defendant during the course of his detention at the Warwick police station were the fruits of an illegal seizure in violation of the Fourth Amendment to the Constitution of the United States, and therefore, were inadmissible in evidence against him. The trial justice erred in admitting such statements on the ground that he found them to be voluntary for Fifth Amendment purposes.

II

The defendant further contends that the admission into evidence of statements that he made to John Carney

over the telephone were inadmissible as violative of his Sixth Amendment right to counsel pursuant to principles enunciated in *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and reaffirmed in *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), and *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), and most recently in *Maine v. Moulton*, — U.S. —, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). The facts relating to the Carney telephone conversations may be briefly stated.

Carney testified that he had asked members of the Warwick police to come to his home because of threatening telephone calls that he had received from Mattatall. While the police were present at Carney's home on December 26 and 27, 1983, calls came in from Mattatall. At Carney's invitation, members of the Warwick police department listened to these conversations and heard Mattatall state to Carney that the victim's death was accidential and not suicidal and that Mattatall might have been involved in the accidential death. These statements were used against defendant at the trial. The parties stipulated that prior to these dates defendant had been arraigned on the charge of homicide and that counsel had appeared to represent him. Evidence indicates that the police officers who listened in on the conversations were aware of the pending homicide charges against Mattatall.

The state argues that this case is distinguishable from *Massiah* and *Henry* because in those cases federal officers had arranged for a person to listen to admissions made by a defendant who had been charged with a crime and for whom counsel had entered an appearance. The sur-

reptitious "eavesdropping" had occurred under circumstances in which the officers had reason to believe that the listening individuals (a friend whose car was wired for sound in *Massiah* and a "sympathetic" fellow prisoner who listened in *Henry*) would elicit incriminating statements from the accused. Here the state argues that the officers were motivated to investigate a separate crime, that of threatening phone calls, not to obtain information concerning the pending charge. The state further contends that the police officers did not instigate the phone calls but only listened to calls initiated by Mattatall himself.

This case is very similar to *Maine v. Moulton, supra.* In that case police had learned from a codefendant turned informant that he suspected that he had received threatening telephone calls from an anonymous source concerning his pending charges. He also stated that Moulton had suggested the killing of a prosecution witness. The police then wired the codefendant for sound, with his consent, and recorded conversations between the codefendant and Moulton. During the course of these conversations, Moulton made a number of incriminating statements concerning the pending charges. These statements were admitted against him at trial. Both the Supreme Judicial Court of Maine and the Supreme Court of the United States held that these statements were improperly admitted.

The Supreme Court of the United States, in passing upon the prosecution's argument that there was a duty and an appropriate interest in investigating new or additional crimes, made the following comment:

> "The police have an interest in the thorough investigation of crimes for which formal charges have al-

> ready been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. * * * In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. * * * Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, not withstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." — U.S. at —, 106 S.Ct. at 489-90, 88 L. Ed. 2d at 498-99.

The fact that Mattatall had not been indicted in this case is of no consequence since the Sixth Amendment right to counsel applies as soon as adversial judicial proceedings have commenced. *Brewer v. Williams, supra; Kirby v. Illinois,* 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). There is no question that the Sixth Amendment right to counsel was applicable in this case, that counsel had entered an appearance in the case, that the police knew or were chargeable with knowledge of this set of facts, and that they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. However justifiable it may have been for the police to take this action for the purpose of investigating other criminal conduct, the plain message of *Moulton* is

that the prosecution may not use evidence obtained regarding the pending charges against the defendant at his trial. Whether the police use a telephone, an electronic device, or a jailmate to obtain this information is not controlling. The doctrine established by the Supreme Court of the United States requires that such information not be used in evidence against the defendant on the charge in respect to which the right to counsel has previously attached. Therefore, testimony concerning the statements made to Carney should not have been admitted into evidence.

Because of the conclusions that we have reached in regard to the issues previously discussed in this opinion, it is unnecessary for us to discuss and analyze the additional five issues that have been raised by the defendant. Obviously, since the conviction of the defendant on the murder charge is to be vacated, the consecutive sentence imposed as a habitual offender must be vacated as well. The other issues raised do not require discussion at this time since they will not necessarily be presented in the same fashion at a subsequent trial.

For the reasons stated, the defendant's conviction is hereby vacated and the papers in the case are remanded to the Superior Court for a new trial.

Chief Justice Bevilacqua did not participate.

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

NO. 85-149-C.A.

STATE OF RHODE ISLAND

V.

STEPHEN R. MATTATALL

STATE'S PETITION FOR REARGUMENT (R. 25)

Now comes the State, pursuant to Rule 25, and petitions for reargument of this Court's June 9, 1986, decision in the above-captioned case. In support hereof the state says:

1. With regard to the first issue, the Court has failed to address the fundamental question whether the police had probable cause to arrest the defendant. The Court assumed, without deciding, that the police lacked probable cause. The State claims that the police had probable cause. Assuming arguendo that the record as developed fails to demonstrate probable cause, the proper remedy would be a remand to permit the trial court to make proper factual findings on this issue;

2. Regarding the second issue, the State submits that the Court has erroneously applied the decision of the United States Supreme Court in *Maine v. Moulton,* 106 S. Ct. 477 (1985);

3. Also with regard to the second issue, the court has erred in suppressing the testimony of the witness Carney. At most, the only properly suppressable testimony would

be that of the police officers who overheard the conversations;

4. The State's contentions are set forth more fully in an accompanying memorandum.

Respectfully submitted,

STATE OF RHODE ISLAND

ARLENE VIOLET
ATTORNEY GENERAL

/s/ Thomas M. Dickinson
Special Assistant Attorney General
Appellate Division
72 Pine St.
Providence, R.I. 02903
274-4400 ext. 291

CERTIFICATION

I, hereby certify that on this 13th day of June, 1986, I delivered a true and accurate copy of the enclosed State's Petition for Reargument to the attorney of record, Janice Weisfeld, Esquire, Assistant Public Defender, Office of the Public Defender, 250 Benefit Street, Providence, Rhode Island 02903.

/s/ Geraldine A. Nanni

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

NO. 85-149-C.A.

STATE OF RHODE ISLAND

v.

STEPHEN R. MATTATALL

STATE'S MEMORANDUM IN SUPPORT OF PETITION FOR REARGUMENT

Introduction

The State respectfully submits that the court's opinion fails to address significant issues that were properly presented. First, the State suggests that this court has erred in failing to consider facts and circumstances that demonstrate the existence of probable cause for arrest. Furthermore, the State submits, this court has erred in the application of *Maine v. Moulton,* 88 L.Ed.2d 481 (1985) to the instant case. For these reasons the State respectfully prays for reargument.

I. *This Court Erroneously Assumed Police Lacked Probable Cause.*

In concluding that the trial justice incorrectly admitted the defendant's statements, this court assumed that "the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide . . ." Slip op. at 4-5. The State respectfully suggests that it is not appropriate for this Court to make such an assumption. The State readily acknowledges that

no probable cause determination was made by the trial justice.[1]

On such a record, this court normally undertakes the task of reviewing the record to determine whether probable cause exists to support the arrest. *State v. Hughes*, 494 A.2d 85 *cert denied*, 106 S.Ct. 536 (1985); *State v. Adams*, 481 A.2d 718 (1984). Such an analysis is necessary because "the determination of the legality of the arrest is an essential predicate for the admission of any evidence that might be the fruit of such an arrest." *State v. Hughes*, 494 A.2d at 88. In the instant case the record clearly established information that could constitute probable cause for arrest. First, the police had received a report regarding a shooting. Upon responding to the scene, police officers found a man dead on the floor lying in a pool of blood. The sole (living) occupant of the home was the defendant. In the presence of police, defendant made a spontaneous and unsolicited statement to the effect that he had supplied the weapon to the deceased. The following testimony by Sergeant Ernest Pierce clearly establishes these facts:

> Q. During the approximate one hour period that you have indicated you were in that home, did you have occasion to see any, what we call a civilian? Anyone who was a non-Warwick Police Department?

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[1] Assuming arguendo that the police did not know that they had probable cause for arrest, this alone would not warrant the court's assumption. Probable cause is an objective concept. The presence or absence of probable cause cannot depend upon the officer's subjective belief that he possessed probable cause. If it did, the exclusionary rule and the Fourth Amendment would have little force. Suppression could be avoided on the basis of the officer's belief—whether right or wrong—that probable cause existed.

A. There was the deceased person on the floor in the kitchen area, and then eventually a man came down from upstairs.

Q. And did that man identify himself?

A. Yes, sir.

Q. And how did he identify himself?

A. Well, he said he was the owner of the property, and his name was Stephen Mattatall.

Q. If you were to see that individual again, would you recognize him, Sergeant?

A. Yes, sir.

Q. Would you look around the courtroom? Do you see him here?

A. Yes, sitting there; brown coat.

MR. CHASE: Your Honor, may the record reflect the sergeant has identified the defendant?

MR. DiLAURO: No objection.

THE COURT: It may so reflect.

MR. CHASE: Thank you.

Q. Now, when you first saw the defendant, what was he doing?

A. He came downstairs. He was walking around the living room area.

Q. Was he displaying any emotion?

A. He was very agitated, nervous.

Q. And what did you do once you saw this, if anything?

A. I asked him to sit down. He was carrying his boots in his hand. He was walking around, and I asked him why didn't he sit down and put his boots on.

Q. And did he?

A. He did.

Q. And where were you at this time?

A. I was in the living room area with him.

Q. Did you remain standing?

A. No, I sat down on the couch with him.

Q. Now, had you been told at that point that he was going to be charged with any crime?

A. No.

Q. Were you told that he was a suspect in the crime?

A. No.

Q. What did you know him to be at the point that you sat on the couch next to him?

A. Owner of the property.

Q. Did you initiate any type of questioning of him at that particular point?

A. No.

Q. Did he say anything to you?

A. Yes.

Q. And what did he say at that time?

A. He looked at the deceased and stated that he should not have shown him the gun last night.

Q. Was this remark that he made in response to any question?

A. I asked him no questions.

Q. He just offered it?

A. Yes, sir.

Q. Did you then say anything to him when he said this?

A. Well, I asked him if that was his gun.

Q. And were you pointing to anything?

A. It was visible underneath the body of the man.

Q. Okay, did he respond to you?

A. He said he had no more to say about the gun.

MR. CHASE: No further questions, Your Honor. Detective Godbout, who was also present at the scene, testified that he had knowledge of the defendant with regard to other investigations. (Tr. 96)

The State respectfully suggests that at the moment when defendant was transported to the station, the police had adequate probable cause to support his arrest. In *In re John*, 425 A.2d 536 (1981) cert. denied, 453 U.S. 922, this court described probable cause as follows:

> [I]t exists when, at the moment of arrest, the facts and circumstances within the police officers' knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent person's believing that the prospective arrestee had committed or was committing an offense. As the term "probable cause" implies, the concept deals with probabilities, not with certainty; probable cause may exist even though the evidence before the arresting officer may not be sufficient to establish guilt.

425 A.2d at 538. In *John* this court aptly described probable cause as a "mosaic." The mosaic in the instant case involved several pieces of information. The police knew that a man had been shot to death in defendant's home. They also knew that defendant was the only person at the scene, that he was extremely agitated, that he admitted that the fatal bullet was shot from his own gun. Defendant further stated that he had supplied the gun to the victim.

Police clearly had probable cause to believe that defendant had possessed a firearm[2] and that he had, at least, aided and assisted a suicide.[3]

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[2] Gen. L. Sec. 11-47-5 prohibits any person previously convicted of a crime of violence from possessing a firearm. In the instant indictment, defendant was charged with two counts of violating this statute. These counts were severed from the murder count for trial. Detective Godbout testified that he knew of defendant's past contacts with the police. Knowledge of defendant's prior convictions would undoubtedly have been within the collective consciousness of the police as provided in *State v. Roberts*, 434 A.2d 257, 262 (R.I. 1981). Thus, at the time of defendant's transportation to headquarters, police unquestionably had probable cause to arrest him for violating § 11-47-5.

[3] Defendant's admission that he supplied the weapon to a potential suicide victim would clearly supply probable cause for the common law crime of aiding a suicide:

> "It has been ably argued that suicide was murder by the English common law. But whether it is to be regarded as murder, or as a separate but similar offense, there is no dispute that suicide, as were explained, was a felony. Because of this fact an attempt to commit suicide was a misdemeanor. One who encouraged another to commit suicide was guilty of a felony as a principal if he was present at the act which caused the death, and as an accessory before the fact if he was not present when the fatal act was committed."

R. Perkins, *Criminal Law* at 83 (2d ed. 1969); *see generally* 40 Am Jur. 2d § 585, at 845-47 (modern jurisdictions differ as to nature of culpability of individual who aids or abets suicide).

The General Assembly provided, in R.I.G.L. § 11-1-1, as follows:

> Every act or omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at common law . . .

Although it would not appear that Rhode Island has ever prosecuted for this crime, it can scarcely be argued that this fact would have any impact on the objective issue of probable cause.

The State respectfully submits that this information was sufficient to justify defendant's arrest. Even if the instant record fails to support probable cause, however, the State suggests that the proper remedy is not reversal. Instead, the matter should be remanded to the trial justice to permit him to make a determination based on a hearing directed to the issue of probable cause.

This court, in granting defendant's appeal, has completely overlooked the information that was in the collective police knowledge. The State therefore requests reargument in order that adequate consideration can be given to this information.

II. *The Court Has Erroneously Applied the Rule of Maine v. Moulton.*

This court has held that statements made by defendant to John Carney could not be admitted into evidence. The court concluded that admission of these statements was violative of the defendant's Sixth Amendment right to counsel. In reaching this conclusion, this court relied upon *Maine v. Moulton,* 88 L.Ed.2d 481 (1985). The State submits that this court's conclusion is contrary to the reasoning of *Moulton.* The *Moulton* case involved a situation where a government agent, who was also the defendant's co-defendant, engaged in a series of conversations with the defendant. The defendant made numerous admissions to the agent, which admissions were tape recorded and utilized for the prosecution at trial. The Supreme Court found this process to be violative of the defendant's Sixth Amendment right to counsel. In reaching this result, the court employed the following reasoning:

> The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by State agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached . . . However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as the intentional creation of such an opportunity.

Id. at 496. (citations omitted) In footnote 12, the Court suggests that the defendant must demonstrate that "the State 'must have known' that its *agent* was likely to obtain incriminating statements from the accused . . ." *Id.* n. 12 (emphasis added).

In the instant case, the trial justice made the following factual findings:

> [The Court] Mr. Carney testified, it was uncontradicted, that he had called the police to his home for protection. That's what the police were there for because of the threats Mr. Carney allegedly had received. While they were there, the phone rang. Mr. Carney answered and asked the police officer to listen in.
>
> This defendant had no right to privacy in a telephone call when he makes it outside. This telephone call was made to Mr. Carney. There is no evidence on the record that there is any suggestion by the police as to what Mr. Carney should say, or how he should direct the conversation, or that he should raise the

issue of the Scanlon shooting. There was nothing at all. The police role was entirely passive. They listened. They gave no instructions.

Mr. Carney stated clearly that he was not acting for the police. He had the police in the house for purposes of protection. (Tr. 277-78)

In the instant case, there was absolutely no evidence that Carney was an "agent" of the police. The trial justice specifically found that the police were mere passive players in the scene. Carney was neither an agent nor an operative. The defendants calls to Carney were totally unrelated to the presence of the police at the scene. Had there been no police presence, defendant's statements to Carney would undoubtedly be admissible. Thus, this was clearly a situation of "luck or happenstance" as anticipated in *Moulton*. On such a record, there is simply no Sixth Amendment violation.

The State suggests that reargument is necessary in order for the court to address the "luck or happenstance" aspect of *Moulton*.

CONCLUSION

For the foregoing reasons the State respectfully prays that the petition to reargue be granted.

Respectfully submitted,

STATE OF RHODE ISLAND

ARLENE VIOLET
ATTORNEY GENERAL

/s/ Thomas M. Dickinson
Special Assistant Attorney General
Appellate Division
72 Pine St.
Providence, R.I. 02903
274-4400 ext. 291

CERTIFICATION

I, hereby certify that on this 13th day of June, 1986, I delivered a true and accurate copy of the enclosed State's Petition for Reargument to the attorney of record, Janice Weisfeld, Esquire, Assistant Public Defender, Office of the Public Defender, 250 Benefit Street, Providence, Rhode Island 02903.

/s/ Geraldine A. Nanni

Supreme Court

No. 85-149-C.A.

State

v.

Stephen R. Mattatall

ORDER

The petition for reargument is denied.

Entered as an Order of this Court this 26th day of June, 1986.

By Order,

/s/ Brian B. Burns
Walter J. Kane, Clerk

1. United States Constitution, amend. IV, reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. United States Constitution, amend. XIV, sec. 1, reads in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. United States Constitution, amend. VI, reads:

Rights of the accused in criminal prosecutions.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. R.I. Gen. Laws § 11-1-1, reads:

11.1-1. *Common law offenses not covered by statute.*—Every act and omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at com-

mon law. Every person who shall be convicted of any such offense which is a misdemeanor at common law shall be imprisoned for a term not exceeding one (1) year or be fined not exceeding five hundred dollars ($500). Every person who shall be convicted of any such offense which is a felony at common law shall be imprisoned for a term not exceeding five (5) years or be fined not exceeding five thousand dollars ($5,000).

5. R.I. Gen. Laws § 11-47-5, reads:

11-47-5. *Criminals and fugitives prohibited from possession.*— No person who has been convicted in this state or elsewhere of a crime of violence or who is a fugitive from justice shall purchase, own, carry, transport or have in his possession or under his control any firearm. Every person violating the provisions of this section shall upon conviction, be punished by imprisonment for not less than two (2) nor more than ten (10) years; and for penalties provided in this section he shall not be afforded the benefit of suspension or deferment of sentence nor of probation.

EDITOR'S NOTE

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ORIGINAL

No. 86-288

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS,

Petitioner

vs.

STEPHEN R. MATTATALL,

Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF RHODE ISLAND

WILLIAM F. REILLY
Public Defender of the
State of Rhode Island

JANICE M. WEISFELD
Assistant Public Defender

DEPARTMENT OF THE PUBLIC DEFENDER
250 Benefit Street
Providence, Rhode Island 02903
401 277-3492

Attorneys for the Respondent

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QUESTION PRESENTED

Whether this Court should review a unanimous decision of the Supreme Court of Rhode Island reversing a conviction on two separate grounds where the state court of last resort found (1) that the defendant's custodial statements should be suppressed, because the court ruled that it "must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe that he was guilty of a crime;" and (2) that statements made by the defendant after his right to counsel had attached should not have been introduced at his trial where they were made to a longtime friend who was actively cooperating with the police, where the friend initiated conversations about the pending charges, and where the defendant was not advised that the police were listening in on his telephone conversations.

Now comes the Respondent, Stephen R. Mattatall, by his attorneys, and opposes the petition of the State of Rhode Island for a writ of certiorari to the Supreme Court of Rhode Island, to review that Court's factually and legally correct opinion reversing his conviction on two separate grounds.

CITATION TO THE OPINION BELOW

The opinion of the Rhode Island Supreme Court which the petitioner seeks to have reviewed is reported as State v. Mattatall, 510 A.2d 947 (R.I. 1986), and is reproduced in the appendix hereto.

STATEMENT OF JURISDICTION

The Respondent agrees with the statement of jurisdiction as it appears in the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVLOVED

The Respondent agrees with the denotation of the constitutional provisions appearing in the petition for a writ of certiorari, but notes that the petitioner's reference to "U.S. Const. Amend. XVI, §1" is apparently intended to be a reference to U.S. Const. Amend. XIV, §1.

STATEMENT OF THE CASE

Custodial statements to the police. On September 24, 1984, police officers from Warwick, Rhode Island, arrived at the respondent's home where the body of one John Scanlon was lying on the kitchen floor, with a .22 caliber gun visible underneath him. The respondent made a statement which indicated that Scanlon's dealth was a suicide. Although the police maintained that the respondent was not a suspect in any crime, they transported him to the police station and placed him in an interrogation room. While the respondent was at the station, the police learned that a weapon other than the .22 caliber gun had inflicted the fatal wound, and that the death could not have been a suicide. During interrogation, the

respondent repeatedly and specifically invoked his right to remain silent. He was further interrogated nonetheless, and eventually broke down and made statements that were then used against him at trial.

Prior to trial, the respondent moved to suppress his custodial statements on the ground, inter alia, that they were the product of an arrest without probable cause, and thus, that their use violated his rights under the Fourth Amendment to the Constitution of the United States and Art. I, sec. 6 of the Rhode Island Constitution. The state did not attempt to show probable cause, but argued instead that the respondent was not a suspect, and was not in custody when he was transported to the police station unhandcuffed, in the front seat of a cruiser. The state presented a series of police witnesses who all swore under oath that the respondent was not suspected of any crime, but was taken to the police station to give a witness statement. The officer in charge of the case, Det. James Godbout, testified that although the defendant was not a suspect and was considered only a witness, he was not at liberty to refuse to go to the police station. The trial justice agreed with the state that the respondent had not been arrested; thus, he did not make any findings on probable cause. On appeal to the Supreme Court of the State of Rhode Island, the state continued to maintain that the respondent had not been arrested. The state did not argue that in any event, there was probable cause for an arrest, and did not urge the Rhode Island Supreme Court to remand for further findings, if the court were to rule that the respondent had been arrested.

In its decision reversing the respondent's conviction, the Rhode Island Supreme Court ruled that for Fourth Amendment purposes, the defendant was illegally seized when he was taken to the Warwick police station. The Court said:

> Their purpose in transporting Mattatall to the police station was investigative only. They did not suspect him of homicide or murder. Such suspicions arose later because of defendant's responses to interrogation, together with the finding of a .357 magnum in a stream near Mattatall's

> house and certain ballistic findings concerning the fact that the gunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe that he was guilty of a crime.

(Opinion of the Rhode Island Supreme Court, 510 A.2d at 950, emphasis supplied). The Supreme Court of Rhode Island found that the defendant's custodial statements were "the fruits of an illegal seizure" in violation of the Fourth Amendment, and accordingly, were inadmissable at trial. 510 A.2d at 952.[1] In a petition for reargument in the Rhode Island Supreme Court, the state for the first time argued -- in a highly unconvincing manner -- that there was probable cause to arrest the petitioner for acts other than homicide, despite the fact that there had never been any attempt to show that the petitioner had been arrested on those grounds. The Rhode Island Supreme Court denied the petition for reargument.

The statements overheard by the police while listening in on the respondent's telephone conversations. While the respondent was at liberty on bail, a longtime friend of his, John Carney, told the police that the respondent had been threatening his wife, Phyllis Mattatall; that Carney had told Mattatall's wife to come to his house; and that Mattatall had called Carney's house and was very angry and threatening. The police came to Carney's home at a time when Carney thought the respondent might call again. When the respondent did call several times as anticipated, Carney had the police listen in on an extension phone, but did not tell the respondent that his conversations were being monitored by the police. During these conversations, Carney did not merely passively listen to the

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1. Because the Rhode Island Supreme Court ruled that suppression was required under the Fourth Amendment, it did not reach the respondent's exceptionally strong argument, under the Fifth Amendment and Art. I, §10 of the Rhode Island Constitution, that his statements also should have been suppressed because the police repeatedly reinitiated interrogation about the homicide after the respondent, several times, had clearly and unambiguously asserted his intention to remain silent. Edwards v. Arizona, 451 U.S. 477 (1981); Michigan v. Mosley, 423 U.S. 96 (1975).

defendant, but engaged in a dialogue with him about the pending homicide; Carney said that during two of the three calls, he, Carney, initiated the conversation about the death of John Scanlon.[2] The police were aware that at the time, the respondent was represented by counsel on the charges stemming from the death of Scanlon.

ARGUMENT

I. THIS CASE DOES NOT PRESENT THE ISSUE FRAMED IN THE STATE'S PETITION -- WHETHER THE FOURTH AMENDMENT REQUIRES SUPPRESSION OF A CONFESSION WHERE NO COURT HAS EVER FOUND THAT AN ARREST WAS UNLAWFUL -- BECAUSE HERE, THE RHODE ISLAND SUPREME COURT RULED THAT THE DEFENDANT'S ARREST WAS UNLAWFUL.

The State of Rhode Island asserts in its petition that no court has ever ruled that the respondent's custody was unlawful; the state claims that after ruling that the respondent had been arrested when he was involuntarily taken to the police station, the Rhode Island Supreme Court then "declined" to address the issue of probable cause. Petition for Writ of Certiorari at 19. These assertions are erroneous. The state never requested the trial justice or the Rhode Island Supreme Court to make a finding of probable cause; notwithstanding the state's failure to assert probable cause, the Rhode Island Supreme Court never "declined" to make such a finding. Instead, the state's highest court did rule that the respondent was arrested without probable cause, and thus, that his seizure was illegal. The Rhode Island Supreme Court said:

> For the purposes of this opinion, the court must assume that at the time Mattatall was ordered transported to Warwick police headquarters, the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide, or indeed that

---

2. During his direct testimony elicited by the prosecutor at the suppression hearing, Mr. Carney clearly and forthrightly testified that during the first conversation, the respondent initiated the dialogue about the death of John Scanlon, but that he, Carney, initiated the conversation about Scanlon during the next two telephone calls (Suppression hearing transcript at 187, 191-93). Thus, the trial justice's finding that Mr. Carney did not bring up the Scanlon matter, referred to in the Petition for Certiorari at 7, is without support in the record with regard to two of the three telephone conversations.

> a homicide had been committed. Their purpose in transporting Mattatall to the station was investigative only. They did not suspect him of homicide or murder. Such suspicion arose only later because of defendant's finding of a .357 magnum in a stream near Mattatall's house and certain ballistic findings concerning the fact that thegunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe he was guilty of a crime.

510 A.2d at 950 (emphasis supplied). While the Rhode Island Supreme Court's use, in the first sentence quoted, of the word "assume" may be confusing to the petitioner, it is clear from a reading of the opinion that the court went on to review the testimony presented at the suppression hearing, and determined that probable cause did not exist at the time of the arrest; probable cause arose only later, the Rhode Island Supreme Court found, when the police learned that the fatal wound was not inflicted by the .22 found lying beneath the deceased, but was inflicted by a .357 magnum found a distance from the scene -- thus precluding a suicidal death. The Rhode Island Supreme Court reviewed this Court's opinions which held, "that the fruits of an illegal seizure or detention are inadmissible in evidence," 510 A.2d at 950, and ultimately concluded that the respondent's statements "were the fruits of an illegal seizure . . . ." 510 A.2d at 952. There is simply no merit to the petitioner's assertion that no court has ever determined that the respondent's arrest was unlawful.

The petitioner "readily acknowledges that based upon the record that was before the Rhode Island Supreme Court, the burden of establishing probable cause in this case is not an easy one." Petition for Writ of Certiorari at 20. The petitioner then goes on to attempt to demonstrate, for the first time directly in any court, that the police possessed probable cause to arrest the respondent for aiding suicide -- arguably not even a crime in Rhode Island -- or for possessing a firearm after a previous conviction of a crime of violence. The petitioner argues that under common law, encouraging one to commit suicide is a crime. Here, however, the respondent told the

police that he should not have shown Scanlon the gun, and made no statements that would lead a reasonable person to believe that he encouraged Scanlon to kill himself. Similarly, one officer's undetailed statement that he had had previous contact with the defendant does not constitute probable cause to believe that the defendant unlawfully possessed a weapon after a previous conviction of a crime of violence. There is no evidence to support probable cause for these crimes, and this issue, first raised in the state's petition for reargument in the Rhode Island Supreme Court, is not properly preserved for review in this Court. Finally, the petitioner is also mistaken when it asserts that the Rhode Island Supreme Court erroneously applied a subjective test to determine probable cause. A unanimous Rhode Island Supreme Court found that subjectively, the arresting officers did not even suspect the defendant, and, objectively, that they in fact "had no probable cause to believe he was guilty of a crime." Opinion of the Rhode Island Supreme Court, 510 A.2d at 950.

II. THE RHODE ISLAND SUPREME COURT PROPERLY APPLIED THE FACTS OF THIS CASE TO THE LAW SET FORTH BY THIS COURT IN MOULTON v. MAINE, ___ U.S. ___, 106 S.Ct. 477 (1985) AND AS SUBSEQUENTLY EXPLICATED IN KUHLMAN v. WILSON, ___ U.S. ___, 91 L.Ed.2d 364 (1986).

Prior to trial on these charges, the respondent, while at liberty on bail, made three telephone calls to one John Carney. Mr. Carney testified that he had been a friend of the respondent's for seven years, and that a relationship of trust existed between them (Transcript of suppression hearing, 183, 196). The respondent was unaware that Mr. Carney, although not a paid informant, was cooperating with the police and that police officers were in fact listening to these conversations on an extension phone in Mr. Carney's house. The police and Carney were aware of the pending charges. During all three conversations, Carney engaged in a dialogue with the respondent concerning the pending charges, which conversation resulted in incriminating statements used against Mattatall at trial; during one conversation, the respondent raised the topic of John Scanlon's death, but

during the two other conversations, Carney himself initated the conversations on this subject.

The petitioner wrongly asserts that the Rhode Island Supreme Court, by ordering the conversations in this unique circumstance suppressed, has created a per se exclusionary rule which applies to all statements obtained after the right to counsel has attached. Instead, that Court ruled that the factual situation presented in this case was very similar to that in Maine v. Moulton, ___U.S.___, 106 S.Ct. 477 (1985), and thus, that a similar legal result must obtain. In Moulton, as here, the person to whom the statements were made, one Colson, had a longstanding, close relationship with the defendant yet without the defendant's knowledge agreed to cooperate with law enforcement agents against the defendant as part of an investigation into threats which the defendant had made. The law enforcement agents instructed Colson not to attempt to question Moulton, but Colson did actively engage in conversation with Moulton about the pending charges, which conversation naturally elicited incriminating statements from the defendant. The police passively listened in on these conversations by electronic means. As the Rhode Island Supreme Court recognized here, although the police may legitimately investigate new criminal conduct by an accused, they may not use a friend, as in Moulton or Massiah v. United States, 377 U.S. 201 (1964), or a "sympathic" fellow prisoner, as in United States v. Henry, 477 U.S. 264 (1980), to elicit incriminating statements about pending charges for which the right to counsel has attached.

Contrary to the petitioner's assertion, this case is unlike Kuhlman v. Wilson, ___U.S. ___, 91 L. Ed. 2d 364 (1986). There, the defendant made spontaneous and unsolicited statements to a temporary cellmate with whom he had no relationship and whom he had no reason to trust. The cellmate, who reported the conversations to the authorities according to a prior agreement, did not engage in any conversation with the defendant which was likely to elicit incriminating statements; instead, he simply listened to what the defendant volunteered. In this case, by contrast, a friend, whom

the respondent had every reason to trust, actively engaged the respondent in conversations about the pending crime, which conversations where likely to and did elicit incriminating statements, while the police monitored those conversations without the respondent's knowledge. The Rhode Island Supreme Court properly applied the facts of this case to the law as established by this Court, and made no legal rulings contrary to this Court's pronouncements.

CONCLUSION

The decision of the Rhode Island Supreme Court does not present an issue framed in the petition for certiorari, and constitutes a proper application of the facts of this case to the law as set forth by this Court. Accordingly, the respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

WILLIAM F. REILLY
Public Defender of the State of
Rhode Island

DEPARTMENT OF THE PUBLIC DEFENDER
250 Benefit Street
Providence, Rhode Island 02903
401 277-3492

Attorney for the Respondent

Menard v. Woonsocket Teachers Guild-AFT 951, 117 R.I. 121, 363 A.2d 1349 (1976).

[3] Although we concede that the express language of the preliminary injunction did not obligate the alliance to initiate any action to terminate the strike,[3] the trial justice's determination that the alliance violated the order prohibiting it from engaging in a work stoppage or strike was based on competent evidence and was not otherwise clearly wrong.

At the hearing on the motion to adjudge the alliance in contempt, the officers testified that they did not confer with one another or any of the membership after the injunction had been issued, but rather each individual made his/her own decision to remain away from work. The trial justice, however, rejected this testimony on credibility grounds and found that once the preliminary injunction had been entered, the alliance, through its officers, communicated the message to the membership that it would adhere to the long-standing principle of no contract, no work.

[4] It is clear that the trial justice was not bound to accept the officers' testimony as credible "'merely because there [was] no direct testimony contradicting it, where it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, satisfy [the trier of fact] of its falsity.'" *Gorman v. Hand Brewing Co.*, 28 R.I. 180, 183, 66 A. 209, 211 (1907); *see also Woonsocket Teachers' Guild*, 117 R.I. at 131, 363 A.2d at 1355.

Competent circumstantial evidence, including a complete shutdown of the Pawtucket school system, contradicted the officers' testimony and served as the legal basis for the trial justice's finding that the alliance had indeed violated the court order. As noted by the trial justice and stated in *School Committee of Pawtucket*, 117 R.I. at 210, 365 A.2d at 503, the fact that the officers of the alliance refused to comply with the injunction was telling evidence that the union, through its officers, had signaled its membership to continue the policy of no contract, no work, notwithstanding the issuance of the preliminary injunction. The display of union solidarity before the trial justice belies the alliance's claim that it and its membership during the period before, during, and after the strike were operating on completely different wavelengths.

The teachers' and the alliance's appeals are denied and dismissed, the judgments appealed from are affirmed, and the case is remanded to the Superior Court for further proceedings.

3. The trial justice expressed her belief that the injunction also required the alliance to advise the membership affirmatively that it had an obligation to go back to work. Because this oversight was not the sole basis of her decision that the alliance violated the order, it does not constitute reversible error.

STATE

v.

Stephen R. MATTATALL.

No. 85-149-C.A.

Supreme Court of Rhode Island.

June 9, 1986.

Defendant was convicted in the Superior Court, Kent County, Kiely, J., of second-degree murder, and he appealed. The Supreme Court, Weisberger, J., held that: (1) defendant, whom lieutenant ordered transported to police station, who did not have option of declining to go with police, and who reasonable person would have believed was subject to official restraint, was seized for Fourth Amendment purposes, and thus,

oral statements made by defendant during course of his detention at police station were inadmissible as fruits of illegal seizure; (2) Sixth Amendment right to counsel was applicable to defendant who had been arraigned on charge of homicide and who counsel had appeared to represent, even though defendant had not been indicted; and (3) telephone statements of defendant to individual that police listened in on should not have been admitted into evidence, where police knew or were chargeable with knowledge of facts indicating defendant's Sixth Amendment right to counsel had attached and police knowingly listened to conversations in which defendant made incriminating statements concerning pending charges.

Vacated and remanded.

1. Criminal Law ⇐394.4(9), 412.1(3)

Any fruits of detention of person in violation of Fourth Amendment rights are inadmissible, even if the fruits are oral statements for which adequate *Miranda* warnings had been given for Fifth Amendment purposes. U.S.C.A. Const.Amends. 4, 5.

2. Arrest ⇐63(4)
Criminal Law ⇐412.1(3)

Defendant, whose transport to police station was ordered by lieutenant, who did not have the option of declining to go with police, and who reasonable person would have believed was subject to official restraint due to number of police officers at scene, was seized for Fourth Amendment purposes, and thus, oral statements made by defendant during course of his detention at police station were fruits of illegal seizure that were inadmissible in evidence against him, even though police did not use physical force upon defendant and did not handcuff him, and trial court found defendant's statements to be voluntary for Fifth Amendment purposes. U.S.C.A. Const. Amends. 4, 5.

3. Criminal Law ⇐641.3(3)

Sixth Amendment right to counsel applies as soon as adversarial judicial proceedings have commenced. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.3(1)

Sixth Amendment right to counsel of defendant for whom counsel had entered appearance in case was applicable, even though defendant had not been indicted in the case, where defendant had been arraigned on charge of homicide. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐412.2(4)

Telephone statements made by defendant to individual who police officers listened in on after defendant had been arraigned on homicide charge and counsel had appeared to represent him, including statements by defendant that victim's death was accidental and not suicidal and that defendant might have been involved in accidental death, were not admissible against defendant at trial, where police knew or were chargeable with knowledge that Sixth Amendment right to counsel was applicable and counsel had entered appearance, and they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. U.S.C.A. Const.Amend. 6.

Arlene Violet, Atty. Gen., Joel S. Chase/Constance Measore, Sp. Asst. Attys. Gen., for plaintiff.

William F. Reilly, Public Defender, Janice M. Weisfeld/Barbara Hurst, Asst. Public Defenders, for defendant.

OPINION

WEISBERGER, Justice.

This case comes before us on the defendant's appeal from a judgment of conviction of second-degree murder entered after a jury trial. Thereafter, the trial justice denied the defendant's motion for new trial and sentenced him to a term of forty years' imprisonment of which ten years were suspended. The trial justice further i
an additional ten year sentence u
defendant, Stephen R. Mattatall, as
ual offender. We reverse the con
The facts of the case insofar as pert
this opinion are as follows.

On the morning of September 2
defendant's wife found the body
Scanlon on the kitchen floor of the
talls' Warwick dwelling. Scanlon
parently been shot in the face. A
ber pistol was visible beneath th
Doctor Loren J. Mednick, an a
medical examiner for the state, late
that Scanlon had died between m
and 4 a.m. on September 24, 1982.
son of a fatal gunshot wound to th

At about 9:15 a.m. Sergeant
Pierce of the Warwick police dep
arrived at the Mattatall home and o
that defendant was extremely a
The sergeant, admonishing defenda
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pended. The trial justice further imposed an additional ten year sentence upon the defendant, Stephen R. Mattatall, as a habitual offender. We reverse the conviction. The facts of the case insofar as pertinent to this opinion are as follows.

On the morning of September 24, 1982, defendant's wife found the body of John Scanlon on the kitchen floor of the Mattatalls' Warwick dwelling. Scanlon had apparently been shot in the face. A .22-caliber pistol was visible beneath the body. Doctor Loren J. Mednick, an assistant medical examiner for the state, later found that Scanlon had died between midnight and 4 a.m. on September 24, 1982, by reason of a fatal gunshot wound to the cheek.

At about 9:15 a.m. Sergeant Ernest Pierce of the Warwick police department arrived at the Mattatall home and observed that defendant was extremely agitated. The sergeant, admonishing defendant to sit down on the couch, asked him some questions about the .22-caliber gun but received no definitive reply. At this point Lieutenant James J. Godbout, who was in charge of the investigation, instructed Sergeant Pierce to have Mattatall transported to police headquarters in order to further the investigation as well as to get statements from Mattatall. Lieutenant Godbout testified that Mattatall was not at liberty to refuse his removal to the police station and presumably was not free to depart from the station until the investigative interrogation had been completed. Patrolman Ernest Heon drove defendant to the station in a police cruiser and then led him to an interrogation room within the detective division.

In the interrogation room Detective Richard Johnson admonished defendant of his *Miranda* rights at about 11 a.m. on September 24, 1982. In response to these admonitions, defendant declined to sign a waiver-of-rights form. Detective Johnson continued to question Mattatall, who informed the detective that he and Scanlon had been drinking together, that the .22-caliber gun was not owned by defendant, but that defendant did own a .357-magnum pistol. The defendant suggested that Scanlon had committed suicide. After about fifteen or twenty minutes of interrogation defendant told Detective Johnson that he no longer wished to discuss the matter with him.

Lieutenant Godbout returned to the police station and brought defendant to a larger interview or interrogation room. The lieutenant advised defendant of his *Miranda* rights again at about 12:30 p.m., and Mattatall signed a waiver-of-rights form at that time. Mattatall stated that he and Scanlon had been drinking the night before and that Scanlon had asked him if he owned a gun. The defendant stated that he gave Scanlon a .22-caliber gun with a single bullet and then went upstairs to bed. Thereafter, when defendant refused to sign a consent form to allow a neutron-absorption test to be administered, a warrant was obtained to perform this test in order to determine whether defendant had recently fired a gun. The test was performed and concluded at about 3 p.m. The results were negative. Thereafter, Lieutenant Godbout continued his interrogation, and Mattatall admitted that he owned a .357 magnum as well as the .22-caliber gun. The defendant refused to tell the police where the magnum was located but signed a consent form allowing the police to search his home for the gun.

At this point, defendant became more and more agitated, began to cry, and then stated that he was showing Scanlon how to work the .22-caliber gun, and that it had accidentally discharged, and struck Scanlon in the face. Lieutenant Godbout then asked defendant why he had not called the rescue squad or the police at that point. Mattatall replied that he had nothing further to say. At this point questioning was terminated, and defendant was allowed to call his attorney. Statements taken during the course of this interrogation were introduced into evidence during the trial after a motion to suppress was denied. During the suppression hearing the prosecution

took the position that since Mattatall was not under arrest when he was taken to the station and was not a suspect at that time, it was unnecessary to establish probable cause in order to justify his transportation to police headquarters and his seizure or custody for investigative purposes. The trial justice agreed that Mattatall was not arrested. No ruling was requested or made on the issue of probable cause for the detention.

Certain statements made by defendant to one John Carney after Mattatall had been arraigned and after counsel had entered an appearance on behalf of defendant also were admitted during the course of the trial. More details concerning these statements will be set forth later in this opinion. It is sufficient at this point to indicate that the conversations between defendant and Carney were overheard by the police with Carney's consent.

In support of his appeal defendant raises seven issues, only two of which will be dealt with in this opinion. Further facts will be supplied as necessary in dealing with these issues.

I

For purposes of this opinion, the court must assume that at the time Mattatall was ordered to be transported to Warwick police headquarters, the police had insufficient evidence to constitute probable cause to believe that defendant was responsible for the homicide, or indeed that a homicide had been committed. Their purpose in transporting Mattatall to the police station was investigative only. They did not suspect him of homicide or murder. Such suspicion arose later because of defendant's responses to interrogation, together with the finding of a .357 magnum in a stream near Mattatall's house and certain ballistic findings concerning the fact that the gunshot wound to the victim was caused by a .357 magnum. Therefore, this court must conclude as a matter of fact that Mattatall was brought involuntarily to the police station for interrogation even though the police did not suspect him and had no probable cause to believe that he was guilty of a crime. The purpose of this removal was investigative and was not considered by the police to be a full custodial arrest. The arrest took place later at the police station after Mattatall made certain statements that he might have intended to be exculpatory but which led the police to believe that he was involved in a homicide. We shall also assume for the purpose of this opinion that defendant was properly admonished of his *Miranda* rights and that his responses to interrogation were voluntary as found by the trial justice.

The Supreme Court of the United States has unequivocally held in a series of opinions that the fruits of an illegal seizure or detention are inadmissible in evidence, whether obtained by interrogation or otherwise. *Taylor v. Alabama*, 457 U.S. 687, 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

[1] The foregoing cases establish the principle that if a person is detained in violation of the rights guaranteed by the Fourth Amendment to the Constitution of the United States, any fruits of the illegal detention are inadmissible even if they are oral statements, as in *Taylor*, *Dunaway*, and *Brown*, for which adequate *Miranda* warnings had been given for Fifth Amendment purposes. It was also established in *Davis v. Mississippi*, as well as in *Taylor v. Alabama*, that the taking of fingerprints during such an illegal detention will result in the exclusion of these prints from evidence.

The state argues that since Mattatall was not under full custodial arrest, his statements, if given voluntarily, should be admissible. This argument was presented in *Dunaway v. New York*, *supra*, and was

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rejected. In that case the Court obse after contrasting such investigative d tion from the brief investigative stop proved in *Terry v. Ohio*, 392 U.S. 1, Ct. 1868, 20 L.Ed.2d 889 (1968), as lows:

"[T]he detention of petitioner was in portant respects indistinguishable fro traditional arrest. Petitioner was questioned briefly where he was fou Instead, he was taken from a neighb home to a police car, transported t police station, and placed in an interro tion room. He was never informed t he was 'free to go'; indeed, he wo have been physically restrained if he h refused to accompany the officers or h tried to escape their custody. The ap cation of the Fourth Amendment's quirement of probable cause does depend on whether an intrusion of t magnitude is termed an 'arrest' und state law. The mere facts that petition was not told he was under arrest, w not 'booked,' and would not have had a rest record if the interrogation ha proved fruitless, while not insignifica for all purposes * * * obviously do n make petitioner's seizure even roughl analogous to the narrowly defined intr sions involved in *Terry* [v. *Ohio*, 39 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 88 (1968)] and its progeny. Indeed, an 'exception' that could cover a seizure a intrusive as that in this case woul threaten to swallow the general rule tha Fourth Amendment seizures are 'reason able' only if based on probable cause." *Dunaway*, 442 U.S. at 212–13, 99 S.Ct. at 2256–57, 60 L.Ed.2d at 835–36.

The Court, in *Dunaway*, rejected the same distinction between investigation and accusation that it had rejected ten years earlier in *Davis v. Mississippi*, *supra*. In *Davis*, a young man, along with forty or fifty other black youths, was detained at a police station incident to a rape investigation, was fingerprinted, and was then released. No probable cause was established for the seizure and detention of Davis. The state argued that Davis was not ar-

rejected. In that case the Court observed, after contrasting such investigative detention from the brief investigative stop approved in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), as follows:

"[T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was 'free to go'; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes * * * obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* [v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] and its progeny. Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway*, 442 U.S. at 212–13, 99 S.Ct. at 2256–57, 60 L.Ed.2d at 835–36.

The Court, in *Dunaway*, rejected the same distinction between investigation and accusation that it had rejected ten years earlier in *Davis v. Mississippi*, *supra*. In *Davis*, a young man, along with forty or fifty other black youths, was detained at a police station incident to a rape investigation, was fingerprinted, and was then released. No probable cause was established for the seizure and detention of Davis. The state argued that Davis was not arrested but only detained briefly for investigative purposes with a minimum intrusion during the course of fingerprinting. The Court responded with this statement:

"[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" *Davis*, 394 U.S. at 726–27, 89 S.Ct. at 1397, 22 L.Ed.2d at 680–81.

[2] There seems no question that in the case at bar defendant was seized for Fourth Amendment purposes and was detained for a substantial period of time during which he was interrogated. There is no question that the fruits of this interrogation assisted in the establishment of probable cause for his arrest and were used against him at the trial in order to obtain his conviction.

This court has had occasion to consider such detention in *State v. Bailey*, 417 A.2d 915 (R.I. 1980). In that case, we established the criteria for determining whether an arrest or seizure has taken place for Fourth Amendment purposes. These factors included: "[1] the extent to which the person's freedom of movement has been curtailed and the degree of force used by the police * * * [2] the belief of a reasonable innocent person [concerning his/her inhibition of movement] in the same circumstances * * * and [3] [the question of] whether the person had the option of not going with the police * * *." *Id.* at 917–18. Applying these factors to the instant case, one is compelled to conclude that Mattatall's freedom of movement was curtailed, certainly from the moment that Lieutenant Godbout ordered that he be

transported to the police station. Mattatall did not have the option of declining to go with the police. Moreover, the fact that there were a number of police officers at the scene would have caused a reasonable person to conclude that he was subject to official restraint. Although the police did not use physical force upon defendant and did not handcuff him, they did act under color of authority and under circumstances that would cause a reasonable person to conclude that refusal to accompany them would be ineffective.

Taking into account the relevant authorities cited above, we are of the opinion that the oral statements made by defendant during the course of his detention at the Warwick police station were the fruits of an illegal seizure in violation of the Fourth Amendment to the Constitution of the United States, and therefore, were inadmissible in evidence against him. The trial justice erred in admitting such statements on the ground that he found them to be voluntary for Fifth Amendment purposes.

II

The defendant further contends that the admission into evidence of statements that he made to John Carney over the telephone were inadmissible as violative of his Sixth Amendment right to counsel pursuant to principles enunciated in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and reaffirmed in *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), and *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and most recently in *Maine v. Moulton*, — U.S. —, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985). The facts relating to the Carney telephone conversations may be briefly stated.

Carney testified that he had asked members of the Warwick police to come to his home because of threatening telephone calls that he had received from Mattatall. While the police were present at Carney's home on December 26 and 27, 1983, calls came in from Mattatall. At Carney's invitation, members of the Warwick police department listened to these conversations and heard Mattatall state to Carney that the victim's death was accidental and not suicidal and that Mattatall might have been involved in the accidental death. These statements were used against defendant at the trial. The parties stipulated that prior to these dates defendant had been arraigned on the charge of homicide and that counsel had appeared to represent him. Evidence indicates that the police officers who listened in on the conversations were aware of the pending homicide charges against Mattatall.

The state argues that this case is distinguishable from *Massiah* and *Henry* because in those cases federal officers had arranged for a person to listen to admissions made by a defendant who had been charged with a crime and for whom counsel had entered an appearance. The surreptitious "eavesdropping" had occurred under circumstances in which the officers had reason to believe that the listening individuals (a friend whose car was wired for sound in *Massiah* and a "sympathetic" fellow prisoner who listened in *Henry*) would elicit incriminating statements from the accused. Here the state argues that the officers were motivated to investigate a separate crime, that of threatening phone calls, not to obtain information concerning the pending charge. The state further contends that the police officers did not instigate the phone calls but only listened to calls initiated by Mattatall himself.

This case is very similar to *Maine v. Moulton, supra*. In that case police had learned from a codefendant turned informant that he suspected that he had received threatening telephone calls from an anonymous source concerning his pending charges. He also stated that Moulton had suggested the killing of a prosecution witness. The police then wired the codefendant for sound, with his consent, and recorded conversations between the codefendant and Moulton. During the course of these conversations, Moulton made a number of

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[3-5] The Supreme Court of the
States, in passing upon the prose
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appropriate interest in investigating
additional crimes, made the followi
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"The police have an interest in t
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498-99.

The fact that Mattatall had n
indicted in this case is of no cons
since the Sixth Amendment right to
applies as soon as adversarial judi
ceedings have commenced. *Brewer*

incriminating statements concerning the pending charges. These statements were admitted against him at trial. Both the Supreme Judicial Court of Maine and the Supreme Court of the United States held that these statements were improperly admitted.

[3-5] The Supreme Court of the United States, in passing upon the prosecution's argument that there was a duty and an appropriate interest in investigating new or additional crimes, made the following comment:

"The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. * * * In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*. * * * Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel." — U.S. at —, 106 S.Ct. at 489-90, 88 L.Ed.2d at 495-99.

The fact that Mattatall had not been indicted in this case is of no consequence since the Sixth Amendment right to counsel applies as soon as adversarial judicial proceedings have commenced. *Brewer v. Williams, supra; Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). There is no question that the Sixth Amendment right to counsel was applicable in this case, that counsel had entered an appearance in the case, that the police knew or were chargeable with knowledge of this set of facts, and that they knowingly listened to conversations in which defendant made incriminating statements concerning pending charges. However justifiable it may have been for the police to take this action for the purpose of investigating other criminal conduct, the plain message of *Moulton* is that the prosecution may not use evidence obtained regarding the pending charges against the defendant at his trial. Whether the police use a telephone, an electronic device, or a jailmate to obtain this information is not controlling. The doctrine established by the Supreme Court of the United States requires that such information not be used in evidence against the defendant on the charge in respect to which the right to counsel has previously attached. Therefore, testimony concerning the statements made to Carney should not have been admitted into evidence.

Because of the conclusions that we have reached in regard to the issues previously discussed in this opinion, it is unnecessary for us to discuss and analyze the additional five issues that have been raised by the defendant. Obviously, since the conviction of the defendant on the murder charge is to be vacated, the consecutive sentence imposed as a habitual offender must be vacated as well. The other issues raised do not require discussion at this time since they will not necessarily be presented in the same fashion at a subsequent trial.

For the reasons stated, the defendant's conviction is hereby vacated and the papers in the case are remanded to the Superior Court for a new trial.

BEVILACQUA, C.J., did not participate.

Supreme Court, U.S.
FILED
OCT 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-288

In The
Supreme Court of the United States
October Term, 1986

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Petitioner,

vs.

STEPHEN R. MATTATALL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

REPLY BRIEF OF THE PETITIONER

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

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or call collect (402) 342-2831

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Now comes Petitioner, the State of Rhode Island and Providence Plantations, (hereinafter referred to as the State), by its attorney, and replies to the Respondent's brief-in-opposition to certiorari as follows.

I. THE RHODE ISLAND SUPREME COURT ERRONEOUSLY APPLIED THE SIXTH AMENDMENT EXCLUSIONARY RULE TO VOLUNTARY, UNSOLICITED STATEMENTS OF THE DEFENDANT MADE TO AN ACQUAINTANCE.

In the instant case, a private citizen, John Carney, engaged in telephone conversations with Respondent Stephen Mattatall (hereinafter referred to as the Defendant) regarding the Defendant's involvement in the death of John Scanlon. These conversations occurred at a time when police officers were in Carney's home, and they overheard the conversations on an extension telephone. In reviewing this situation for Sixth Amendment purposes, the Superior Court trial justice found as a matter of fact that the police played no role whatsoever in initiating or directing the resultant conversations:

> There is no evidence on the record that there is any suggestion by the police as to what Mr. Carney should say, or how he should direct the conversation, or that he should raise the issue of the Scanlon shooting. There was nothing at all. *The police role was entirely passive. They listened. They gave no instructions.*

Tr. at 277-78 (emphasis added). In sum, then, based upon the facts as found by the trial judge, this conversation occurred without any police involvement or intervention.

Without disputing the accuracy of this factual conclusion, the Defendant purports to disagree with the facts

as set forth in the State's petition for certiorari. Defendant contends that the trial judge's findings were erroneous, because the record reveals that *Mr. Carney* actively participated in the conversations and actually discussed the homicide with Defendant. This conduct, Defendant suggests, demonstrates that the Sixth Amendment has been violated. The difficulty with the Defendant's contention is that it fails to address the absolutely passive role played by the police in these conversations. Rather than dispute the findings of the trial judge on this point, Defendant chooses to ignore the passivity of the police. Of course, the only police involvement in this case was listening. Defendant does not contend that the police arranged for the conversation or facilitated it in any way. Nevertheless, because the Sixth Amendment right had attached, Defendant contends that any statements he made may not be admitted into evidence against him, even though police misconduct played no role in producing the statements. With all due respect to the Rhode Island Supreme Court, the State suggests that the Defendant's position is utterly foreign to any concept of the Sixth Amendment that has been endorsed by this Honorable Court.

Defendant's position would appear to insulate from admissibility and statement made by a Defendant once the Sixth Amendment right to counsel has attached, whether the police have played an active or a passive role. After all, the trial judge found—and the Defendant does not dispute—that the police role in this case was totally passive. There is scant difference between a case such as this one—where the police passively listen—and one in which the citizen-witness makes a post hoc report of an incriminat-

ing conversation. The State cannot conceive that this Court would endorse a rule that would preclude such citizen-witnesses from reporting conversations to the police and testifying regarding their contents. Such a rule, however, would seem to be encompassed in the decision below. Yet this reasoning is antithetical to the views enunciated by this Court in *Kuhlman v. Wilson*, 91 L. Ed. 2d 364 (1986):

> [A] defendant does not make out a violation of [the Sixth Amendment] simply by showing that an informant, either through prior arrangement or voluntarily, reported incriminating statements to the police. Rather, the defendant must demonstrate that *the police and their informant* took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 384-85 (emphasis added). The State respectfully submits that if the rule of *Wilson* has any meaning at all, a defendant must be required to demonstrate some activity by the police in eliciting the incriminatory statements. Where, as here, the police merely listened, *Wilson* requires that the motion to suppress be denied.

This case represents a dangerous departure from the law as enunciated by this Court in *Wilson* and its precursors. The Rhode Island Supreme Court has adopted a rule of *per se* exclusion that applies to any statements made by a defendant after attachment of the Sixth Amendment right, regardless of the degree of police activity in producing the statement. Such a rule must not stand. The petition for certiorari should be granted.

II. IN A CASE WHERE NO COURT HAD EVER DETERMINED THAT DEFENDANT'S ARREST WAS UNLAWFUL, THE RHODE ISLAND SUPREME COURT ERRED BY INVOKING THE FOURTH AMENDMENT EXCLUSIONARY RULE TO SUPPRESS A DEFENDANT'S VOLUNTARY STATEMENT.

Disputing the premise of the State's petition, the Defendant claims that the Rhode Island Supreme Court actually made a determination regarding probable cause in this case. The Defendant has fallen victim to the same logical flaw that befell the Rhode Island Supreme Court: the unwarranted assumption that because the police did not believe that they were arresting the Defendant, they must have lacked probable cause to arrest. The State has addressed this issue at length in its petition for certiorari. It suffices at this stage to point out the revolutionary nature of the Defendant's position on this issue. In Defendant's view, the *subjective belief* of the arresting police is the controlling factor in determining whether or not an arrest is lawful. Defendant's position could have a remarkable effect upon the exclusionary rule and its application. Indeed, under the Defendant's logic, had the police officers in this case merely testified to a subjective belief in the existence of probable cause, their subjective statements would govern and the motion to suppress would be denied.

Defendant's view of this issue is simply erroneous. This Court has held on numerous occasions that the existence of probable cause is an objective question. *E.g. Draper v. United States*, 358 U.S. 307, 313 (1951) (promulgating "reasonable man" standard for probable cause); *Brown*

v. Texas, 443 U.S. 47, 51-53 (1979) (reasonableness of detention must rest on objective criteria). By rejecting the need for an objective determination of probable cause, the opinion of the Rhode Island Supreme Court has departed from the controlling law as enunciated by this Court. Certiorari should be granted to review the lower court's erroneous judgment.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition for certiorari, this Honorable Court should grant a writ of certiorari in order to review the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

By its Attorneys

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

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ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant
Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

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Now comes the Petitioner, by its attorney, and supplements its original Petition and Reply Brief in accordance with Rule 22.6. Petitioner represents that, since the filing of the foregoing documents, three new decisions have been reported that conflict with the decision of the Rhode Island Supreme Court in the instant case. Because such a conflict is one clear ground for the grant of certiorari pursuant to Rule 17.1(c), these decisions are of sufficient significance that the Court should consider them before acting on the Petition.

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS IN CONFLICT WITH TWO RECENT DECISIONS OF THE SUPREME COURT OF FLORIDA AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

In the instant case, the Rhode Island Supreme Court held that the Sixth Amendment required the suppression of the defendant's statements to a private citizen. The trial judge specifically found that the police had played no role in eliciting the statements and had merely listened to the conversation between the defendant and the citizen. Despite the passive nature of the police conduct in this case, the Rhode Island Supreme Court found that this court's decision in *Maine v. Moulton*, 106 S. Ct. 477 (1985), required suppression.

The instant supplemental memorandum has been filed because of three recent cases that conflict with the decision of the Rhode Island Supreme Court. These cases are in direct conflict with the result reached in the instant case, and they therefore present this Court with the type of split in authorities that justifies review by certiorari.

All of the cases were decided after September 1, 1986, and were therefore unavailable to the parties at the time the petition for certiorari was filed. The cases are discussed infra, and copies of all cases have been appended hereto.

1. *DuFour v. State*, No. 65,694 (Florida Supreme Court) (Sept. 4, 1986) (LEXIS slip opinion appended hereto). In *DuFour*, the defendant alleged that his Sixth Amendment rights had been violated because a cellmate testified against him at trial. The Florida Supreme Court rejected defendant's Sixth Amendment claim, finding that the cellmate-witness in DuFour's case had voluntarily come to the authorities and offered to give evidence against the defendant. Thus, the confrontation and conversation between DuFour and the informant resulted from no activity by the police. Finding no evidence that the police had actively elicited incriminating statements from the defendant, the court in *DuFour* found no Sixth Amendment violation.

This result stands in stark contrast to the decision in the instant case. In the case at bar, the record demonstrated that the police were entirely passive listeners to the conversation between the citizen-witness and the defendant. The decision of the Rhode Island Supreme Court is therefore in direct conflict with the decision of the Florida Supreme Court.

2. *United States v. Hicks*, 798 F.2d 446 (11th Cir. Sept. 3, 1986). In *Hicks*, the Eleventh Circuit rejected the defendant's Sixth Amendment claim. This case involved a cellmate situation similar to the one in *DuFour*, *supra*. The court specifically found that the authorities

had neither deliberately planted an informant in the cell, nor had they instructed the witness to conduct an interrogation. Finding the government's role to have been totally passive, the Eleventh Circuit rejected the defendant's Sixth Amendment claim. This decision, again, stands in sharp contrast to the result reached by the Rhode Island Supreme Court in the instant case.

3. *United States v. Taylor,* No. 85-1758 (10th Cir. Sept. 8, 1986) (LEXIS slip opinion appended). In this case a prison inmate approached authorities and reported that the defendant had made incriminating admissions to him. The informant agreed to be placed in a cell with the defendant. During the informant's stay in the cell, the defendant made incriminating admissions that were subsequently used against him. Although this informant testified that he hoped for some special treatment as a result of his conduct, the Tenth Circuit held that he was merely an informant and not an agent of the government. The court reasoned that even if the informant had deliberately elicited incriminating statements, there would be no bar to the evidence gathered because he was not acting as an agent of the prosecution.

In *Taylor* the police played a far more active role than they did in the instant case. Indeed, the police in the case at bar were entirely passive. Applying the reasoning of *Taylor* to the instant case, it is clear that the Tenth Circuit and the Rhode Island Supreme Court are in stark conflict.

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CONCLUSION

The foregoing recent cases clearly conflict with the decision of the Rhode Island Supreme Court in the case at bar. The existence of a conflict between state and federal courts clearly justifies certiorari in the instant case. R. 17.1(c). For this reason, and for the reasons already set forth in the Petition and the Reply Brief, this Court should grant a writ of certiorari to review the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

STATE OF RHODE ISLAND
AND PROVIDENCE
PLANTATIONS

By its Attorneys

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant
Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

APPENDIX

DONALD WILLIAM DUFOUR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 65,694

Supreme Court of Florida

Slip Opinion

September 4, 1986

An Appeal from the Circuit Court in and for Orange County, Michael F. Cycmanick, Judge—Case No. CR 82-5467.

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., Concur OVERTON, J., Concurs in result only in the conviction, and concurs with the sentence.

James B. Gibson, Public Defender, Brynn Newton, Assistant Public Defender, for Appellant.

Jim Smith, Attorney General, W. Brian Bayly, Assistant Attorney General, for Appellee.

ADKINS

ADKINS, J.

Donald William Dufour appeals his conviction of first-degree murder and the death sentence imposed. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm both.

The evidence at trial established the following scenario. State witness Stacey Sigler, appellant's former girl-

friend, testified that on the evening of September 4, 1982, the date of the murder, appellant announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, appellant called Sigler and asked her to meet him at his brother's home. Upon her arrival, appellant was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.

Appellant had met the victim in the bar and driven with him to a nearby orange grove. There, appellant robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.

According to witness Robert Taylor, a close associate of appellant's, appellant said that he had shot a homosexual from Tennessee in an orange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from appellant a piece of the stolen jewelry, helped appellant disassemble a .25 automatic pistol and discard the pieces in a junkyard.

State witness Raymond Ryan, another associate of appellant's, also testified that appellant had told him of the killing, and that appellant had said "anybody hears my voice or sees my face has got to die." Noting appellant's possession of the jewelry, Ryan asked him what he had paid for it. Appellant responded "You couldn't afford it. It cost somebody a life." Ryan further testified that he had seen appellant and Taylor dismantle a .25 caliber pistol.

Henry Miller, the final key state's witness, testified as to information acquired from appellant while an inmate in an isolation cell next to appellant's. In return for immunity from several armed robbery charges, Miller testified that appellant had told him of the murder in some detail, and that appellant had attempted to procure through him witness Stacey Sigler's death for $5,000.

At the penalty phase of the trial, Taylor testified over objection to the details of a Mississippi murder for which appellant had been convicted of first-degree murder. The jurors unanimously recommended death and appellant was so sentenced.

Appellant urges that reversal of his conviction is warranted upon a number of grounds. First, he contends that the trial court erred in denying his motion to suppress evidence seized during a search of his residence. The insufficiency of the affidavit supporting the warrant, it is argued, renders the warrant invalid and the fruits of the search inadmissible. An examination of the affidavit, however, leaves little doubt that it amply established the necessary probable cause.

The affidavit, sworn to by an Orange County detective, first indicated that the victim had been murdered with a .25 caliber pistol, and identified certain unique jewelry last seen on the victim's person. The heart of the affidavit centered upon the statement of Raymond Ryan. Ryan stated that appellant informed him that he had killed a person for his gold jewelry, and that he (Ryan) had seen some of this jewelry in the possession of appellant and Robert Taylor. Finally, Ryan indicated that appellant and Taylor "were very close friends and frequent-

ly visit each other's apartment, and have committed other crimes together," and that he had seen in Taylor's possession a .25 caliber automatic.

Appellant initially argues that the weaknesses rendering the affidavits insufficient in Yesnes v. State, 440 So.2d 628 (Fla. 1st DCA 1983), and King v. State, 410 So.2d 586 (Fla. 2d DCA 1982), similarly inflict the instant affidavit. We disagree.

A crucial factor distinguishes the affidavits in Yesnes and King from the instant affidavit. In the first two cases, the affidavits were based on the substantially uncorroborated statements of shadowy and unknown confidential informants. The Yesnes court, for instance, applying the "totality of the circumstances" test set forth in Illinois v. Gates, 462 U.S. 213 (1983), found the affidavit "totally lacking in facts sufficient to show the requisite veracity or reliability of the unnamed informants and the information supplied by them." 440 So. 2d at 632. Here, the disclosure of the source of the information and the specificity of the facts disclosed, combined with the detective's independent investigation tending to corroborate Ryan's statements, manifestly established the probable cause justifying the search.

The weakness present in King is likewise absent in the instant affidavit. In that case, the confidential informant never indicated when he saw the illegal act—the defendant's possession of marijuana. The affidavit was therefore insufficient because the offense could have occurred years before; the magistrate was unable to determine any time limitations from the information before him.

The instant affidavit, however, dated October 11, 1982, indicated that the victim's body had been discovered on September 6, 1982. Additionally, Ryan alleged that he had seen Taylor in possession of the murder weapon within the past ten days. These factors amply served to provide for the magistrate a time frame in which to conclude that the jewelry and the handgun could well be contained in appellant's apartment.

Appellant lodges his final attack on the affidavit under the authority of Blue v. State, 441 So.2d 165 (Fla. 3d DCA 1983). Such an argument is without merit. Contrary to appellant's assertions, the affidavit under these circumstances required no explicit statement that the jewelry and gun could be located in appellant's apartment. Because the items could reasonably be presumed to be located either on the appellant's person or in his home, it was not arbitrary for the magistrate to make that determination. Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1973); State v. Malone, 288 So.2d 549 (Fla. 1st DCA 1974).

Appellant next argues that the testimony of Richard Miller, a fellow inmate during his incarceration after the murder, should have been suppressed under the authority of United States v. Henry, 447 U.S. 264 (1980). Having reviewed Henry and the Court's more recent pronouncement in Maine v. Moulton, 106 S.Ct. 477 (1985), we find no such impermissible interference with appellant's sixth amendment right to counsel in this case, and reject this claim.

In Henry, the Court found an informant's testimony inadmissible when the informant, the defendant's cellmate,

was approached by the police and instructed to "be alert" to any statement the defendant might make. The informant thereby became a government agent for the illicit purpose of obtaining incriminating statements from the accused in the absence of counsel. The Court, in applying Massiah v. United States, 377 U.S. 201 (1964), and finding that Henry's right to counsel had been violated, essentially affirmed that the government would not be permitted to obtain by trickery or stealth incriminating evidence it could not have legitimately obtained. In analyzing whether the government had impermissibly "deliberately elicited" the information from the defendant through its informant, 447 U.S. at 272, the Court focused upon certain elements of the government/informant relationship: the government's initial contacting of the witness, known to have a history as a paid informant, its subsequent instructions to "be alert" to the defendant's statements, and the "contingent fee" arrangement providing for the witnesses' compensation. These elements indicated an orchestrated plan reflective of the government's intention to set the stage for an interference with Henry's right to the assistance of counsel.

In the subsequent Moulton decision, the court found that the state had "knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent," 106 S.Ct. at 490, and so violated the defendant's sixth amendment rights. In spite of the opinion's fairly broad language equating the state's "knowing exploitation . . . of an opportunity to confront the accused without counsel being present" with its "intentional creation of such an opportunity," 106 S.Ct. at

487, the Court found such "knowing exploitation" on fairly outrageous facts.

First, the individual acting as a government agent, Colson, was no mere cellmate of Moulton's. Rather, he was a co-defendant, facing trial on the same charges as Moulton, and apparently aligned with Moulton against the state in the adversarial process. Upon reaching an agreement with the authorities, Colson used this position to uncover incriminating evidence which legitimately lay beyond the authorities' reach.

Secondly, although Colson originally approached the police, it was the latter who conceived and set into motion, albeit with Colson's consent, the flagrant violations of Moulton's rights which followed. The authorities first placed a recording device on Colson's telephone, with instructions to activate the device upon receiving either anonymous phone threats or calls from Moulton. By this means, three conversations were recorded between Colson and Moulton. In the third conversation, Moulton asked Colson to set aside an entire day so that the two of them could meet and plan their defense.

The authorities then obtained Colson's consent to be equipped with a body wire transmitter in order to monitor and record the meeting. Although the police acknowledged at trial their awareness that the two were meeting to discuss the charges on which they both had been indicted, Colson was instructed "not to attempt to question [Moulton], just be himself in the conversation." 106 S.Ct. at 481. At the meeting, the two discussed and planned their alibis, and so necessarily detailed the commission of various crimes. Through joking and pretensions of forgetful-

ness, Colson induced Moulton to repeatedly incriminate himself. Upon the admission into evidence of several portions of this tape, Moulton was convicted.

We cannot find that either Henry or Moulton compel a finding that appellant's sixth amendment rights have been violated in this case. A review of the facts discloses no "stratagem deliberately designed to elicit an incriminating statement." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982), cert. denied, 459 U.S. 1158 (1983), quoting Malone v. State, 390 So.2d 338, 339 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981). First, Miller approached the authorities on his own initiative, indicating scheming on his part rather than the government's. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 105 S.Ct. 223 (1984); Barfield v. State, 402 So.2d 377 (Fla. 1981).

We affirm the vitality of this factor in a sixth amendment right to counsel analysis, noting that the Moulton Court's statement that "the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in Massiah or Henry," 106 S.Ct. at 486-87, refers to the initiation of contact between the accused and the agent, rather than the agent and the government. In Henry, in fact, a crucial element of the state's intentional creation of a situation likely to induce Henry to make incriminating statements involved its initial contacting of the agent and its subsequent instructions to "be alert" to Henry's statements.

Finally, we cannot find the "knowing exploitation" forbidden by Moulton in the absence of more action on the state's behalf tending to indicate a deliberate elicitation of incriminating information. After approaching au-

thorities with information of appellant's planned escape attempt, Miller was neither encouraged nor discouraged from obtaining further information. As we held in Johnson v. State, 438 So.2d 774, 776 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), "Henry and Malone do not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population." We find no violation of appellant's right to counsel.

In his third argument on appeal, appellant contends that the trial court erred in denying several motions for mistrial. Principally, appellant contends that the prosecutor's mention in his opening argument of Miller's anticipated testimony concerning appellant's escape attempt introduced to the jury irrelevant collateral crime evidence. In light of our holding above as to the admissibility of Miller's testimony, we disagree. The testimony was relevant and admissible as defining the relationship between the state's witness and appellant. Yesbick v. State, 408 So.2d 1083 (Fla. 4th DCA), review denied, 417 So.2d 331 (Fla. 1982). Appellant's several other motions for mistrial similarly lack merit.

Appellant next contends that the trial court abused its discretion in limiting the cross-examination of state witness Robert Taylor. Taylor, appellant's co-defendant in a Mississippi murder prosecution, awaited trial on murder charges in Georgia at the time he testified in appellant's trial. Prior to trial, the state filed several motions in limine seeking to limit the scope of cross-examination of Taylor. The trial court granted two of these motions, prohibiting the defense from asking Taylor any ques-

tions in response to which he could be expected to exercise his right against self-incrimination, and from mentioning Taylor's confession to an Orange County sheriff of a number of crimes.

We cannot find that the trial court abused its discretion in either respect. In granting the first motion, the court did not prohibit the defense from impeaching the witness regarding the murder charge. Rather, it prohibited the defense from delving into the facts of a pending case. The jury learned of the charges, and that Taylor hoped to have the state attorney intervene on his behalf at the trial. Because the essence of the witnesses' bias was established through direct and cross-examination, we can find no error in the trial court's "preventing the cross-examination from . . . becoming, under the guise of impeachment, a general attack on the character of the witness." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Similarly, we find the exclusion of the Orange County "confessions" proper. The state's uncontradicted motion established that Taylor "confessed" to a series of unsolved crimes on which the state had insufficient evidence to prosecute, thus clearing the police files in return for a promise not to forward the cases to the state attorney for prosecution. Since the jury was adequately exposed to Taylor's extensive felony record and his tendency to bargain with the state, no need existed for further cross-examination, especially upon such a flimsy foundation.

Appellant next argues that the trial court erred in allowing witness Detective Hansen to read into evidence portions of a statement made by Taylor in 1982, under

section 90.801(2)(b), Florida Statutes (1983), as prior consistent testimony tending to rebut implications of improper motive or recent fabrication. While noting that a witness' testimony may not ordinarily be bolstered with corrobation with his own prior consistent statements, Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982), we find that the statements in this case fall within the rule's narrowly drafted terms and were properly admitted. First, through its references in cross-examination to Taylor's negotiations with the state attorney's office involving armed robbery charges, the defense adequately impeached the witnesses' credibility, raising the specters of both improper motive and recent fabrication. Because, too, the statement in question was made at the time of Taylor's arrest in October 1982, prior to the robbery plea negotiations, Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983), and the actual filing of the Georgia murder charge, the trial court could properly have found that the statement was made prior to the existence of Taylor's motive to fabricate.

In his sixth point on appeal appellant argues that a mistrial was required after certain comments in the prosecutor's closing argument impermissibly directed the jurors' attention to appellant's failure to take the stand. Fla. R. Crim. P. 3.250. An examination of the statements in question and the context from which they arose, however, leads us to conclude that the statements directed the jury's attention to defense counsel and the evidence presented rather than to appellant's failure to testify. First, in the context of reviewing the bargain that witness Miller

had struck with the state in exchange for his testimony, the prosecutor said:

Nobody has come here and said Mr. Miller's testimony was wrong, or incorrect, or that that was not the deal he was offered.

Far from commenting on appellant's failure to testify, we find that an examination of the statement in context make clear that "Mr. Miller's testimony" refers only to his testimony on his negotiations with law enforcement authorities. As such, the statement merely permissibly commented on the evidence. United States v. Fogg, 652 F.2d 551 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); State v. Bolton, 383 So.2d 924 (Fla. 2d DCA 1980).

Second, we find that the prosecutor's statement to the jury that "[Y]ou haven't number one, heard any evidence that Donald Dufour had any legal papers in the cell with him" merely rebutted the statement of the defense in its closing argument hinting that witness Miller had access to and could have based his testimony upon appellant's "legal papers." This comment merely referred to the lack of any evidence on the question, White v. State, 377 So.2d 1149 (Fla. 1979), and fell into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject. State v. Mathis, 278 So.2d 280 (Fla. 1973). The trial court thus acted properly in denying these motions for mistrial.

Appellant next argues that the trial court committed reversible error in finding appellant's absence at a pretrial motions hearing voluntary and conducting it in his absence. Although appellant would liken the facts of the instant case to the absence found reversible in Francis

v. State, 413 So.2d 1175 (Fla. 1982), we agree with the state that appellant voluntarily absented himself from the proceeding within the terms of Florida Rule of Criminal Procedure 3.180(b) by embarking on a "hunger strike" culminating in his hospitalization during the hearing. The trial court acted well within its discretion in so ruling.

Next, appellant challenges the trial court's denial of his motions for a continuance. Finding that the requisite showing of a palpable abuse of the court's discretion in so ruling has not been made, Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981), we reject this claim.

In his ninth point on appeal, appellant contends that the trial court erred in declining to impose sanctions for an alleged violation by the prosecution of the provisions of Florida Rule of Criminal Procedure 3.220(b)(3). We must first examine the rule's terms to ascertain whether or not any violation occurred below, and, if so, whether any prejudice accrued therefrom to the appellant. James v. State, 453 So.2d 786, 790 (Fla. 1984), cert. denied, 105 S.Ct. 608 (1984).

Rule 3.220 sets forth the respective rights and obligations of the parties concerning discovery in the criminal context. Section (b)(3) of the rule indicates that if the defense has chosen to demand of the state a list of the latter's witnesses, it must, within seven days of the receipt of that list, furnish to the state a list of its expected witnesses. At that point, the rule limits the prosecution's otherwise plenary power to subpoena witnesses and take

ex parte testimony as to any violation of the criminal law within its jurisdiction. Able Builders Sanitation Co. v. State, 368 So.2d 1340 (Fla. 3d DCA), dismissed, 373 So.2d 461 (1979); § 27.04, Fla. Stat. (1985). After receiving the defense witness list, the prosecutor may not subpoena any individual on that list without notifying defense counsel and allowing them to attend the interview and examine the witness.

The alleged violation below involved witness Stacey Sigler. Sigler was originally listed on the state's witness list provided to the defense under rule 3.220(a)(1)(i). The defense merely duplicated this list and submitted it as its own, thereby attempting to force the requirement of notice and the right to attend any meeting between Sigler and the prosecution. Relying on dictum in State v. Barreiro, 432 So.2d 138, 140 n.5 (Fla. 3d DCA 1983), review denied, 441 So.2d 631 (1983), which indicated that "[i]f defense counsel wants to protect against the state's ex parte examination of a witness, he can do so by furnishing the witness's name on his list of defense witnesses," the defense attempted to gain, and was denied, admission to an interview between Sigler and the state's attorney. The defense subsequently moved for dismissal of the indictment or the exclusion of Sigler's testimony as sanctions for the state's behavior in excluding the defense from the interview.

Because we find that no violation of the discovery rules took place below, we approve the trial court's refusal to impose any sanctions. Appellant's construction of the discovery provisions is overbroad and would cut the rule loose from its logical moorings. It is not enough to merely duplicate the list of state's witnesses and thus

transform Sigler into a witness "whom the defense counsel expects to call as [a witness] at the trial or hearing." Fla. R. Crim. P. 3.220(b)(3).

No indication exists that defense counsel, in good faith, intended to call Sigler as a witness. In fact, because Sigler proclaimed ignorance of the crime until the meeting complained of, she apparently lacked the requisite personal knowledge required of a witness. Application of the rule's provisions to the instant facts, as urged by appellant, would frustrate the purpose underlying the rule. When properly applied, rule 3.220(b)(3) serves the protective purpose of preventing the state from driving an unfair wedge between defense counsel and its key witnesses, through ex parte examination, during sensitive pretrial stages. It is not intended to inhibit the prosecution's power to prepare its case by disallowing all ex parte communication with its witnesses.

We disapprove of tactics such as those employed by the defense below, because the inclusion of an unwarranted abundance of names on the defense witness list can ultimately only dilute the rule's protective power. The defense is certainly not prohibited from listing as its own those witnesses already listed by the state, but it must do so conscientiously, naming only those it actually expects to call. Otherwise, by attempting to use the rule as a sword, rather than the shield it is intended to be, the defense risks losing any protection which that shield might have offered.

The court additionally rejected the application of rule 3.220(b)(3) because it found, under the circumstances, that Sigler approached the prosecutor voluntarily. In

spite of the initial subpoena, the court found that Sigler had approached the authorities, on the advice of her attorney, in order to negotiate for immunity. Noting that the interview took place two days after the subpoena date, the court found her approach voluntary and the rule inapplicable.

Because we cannot disagree that Sigler was improperly listed as a defense witness, and that her testimony was given voluntarily, we approve of the trial court's refusal to impose sanctions. Bobley v. State, 327 So.2d 900 (Fla. 3d DCA 1976), cert. denied, 341 So.2d 292 (Fla. 1976).

Appellant next argues that the trial court's forcing him to wear leg shackles during the trial led to undue jury prejudice and violated his fundamental right to a fair trial by vitiating his right to a presumption of innocence. Appellant cites Estelle v. Williams, 425 U.S. 501 (1976), for the principle that forcing a defendant to face trial in prison garb impermissibly risks on impairment of his presumption of innocence. In Estelle, however, the Court cited Illinois v. Allen, 397 U.S. 337 (1970), in which the Court upheld the practice of shackling the defendant when necessary to control a contumacious defendant, and noted that in some circumstances physical restraints may further an essential state policy. 425 U.S. at 505.

The court below found the shackles necessary in view of appellant's planned escape attempt from the Orange County jail and his conviction of two murders in Mississippi and subsequent placement on death row. The court explained that while "if he tried to escape he would be unsuccessful . . . someone may be hurt. I don't want that to occur."

The court did attempt to minimize any prejudice accruing to appellant by granting defense counsel's request to place a table in front of the defense table in order to hide the leg shackles. Under these circumstances, and from the lofty stance of appellate review, we will not second-guess the considered decision of the trial judge. We therefore reject appellant's claim.

In his eleventh point on appeal, appellant contends that the trial court erred in denying appellant's motion for mistrial after the jury learned that one juror had received a "strange" phone call and been dismissed. The caller dialed the number, asked if "Mr. Girdner", the juror's husband—not the juror—was in, and hung up. Although the phone call could not be linked to the trial in any sense, the trial court, pursuant to defense counsel's urgings, in an "abundance of caution" dismissed the juror from service immediately prior to closing arguments.

Contrary to the court's instruction, the dismissed juror mentioned the phone call to other members of the jury. The court then called the jury in, explained the circumstances surrounding the call and the juror's dismissal, and assured the jury that the call had no connection with the trial and that their phone numbers were not made public. Finally, the court determined that the jurors had no reservations about their further service.

Determinations of whether substantial justice requires a mistrial and related questions involving juror conduct are both lodged within the sound discretion of the trial court. Doyle v. State, 460 So.2d 353 (Fla. 1984). In light of the tenuous connection between the trial and the call, the court's instruction to the jury was sufficient to cure

any taint which may have resulted from the juror's knowledge of the call. Clark v. State, 443 So.2d 973 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984); State v. Tresvant, 359 So.2d 524 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 375 (1979). We therefore reject appellant's contention.

We now reach appellant's claims as to error in the sentencing portion of the proceeding. First, appellant argues that the trial court erred in denying his proposed special instructions on the jury's sentencing recommendation. We cannot find the court's refusal to deviate from the standard jury instructions improper, and the court had no duty to instruct the jury that a life sentence could be imposed even in the absence of any mitigating circumstances. In fact, we recently rejected such a contention in Kennedy v. State, 455 So.2d 351 (Fla. 1984), cert. denied, 105 S.Ct. 981 (1985).

Next, appellant argues that the trial court erred in admitting into evidence during the penalty phase extensive details of an earlier murder he had committed in Mississippi. While appellant acknowledges that details of prior felonies involving the use or threat of violence to the person are properly admitted in the penalty phase of a capital trial, and that evidence inadmissible in the guilt phase may be relevant and admissible in evaluating aggravating and mitigating circumstances, Perri v. State, 441 So.2d 606 (Fla. 1983); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), he contends that the trial court here "went too far." We find this argument meritless. Justus v. State, 438 So.2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984); Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984).

In his fourteenth point on appeal, appellant argues that the trial court erred in denying his motion to strike death as a possible penalty because the charging indictment had failed to allege the aggravating factors possibly subjecting him to the death penalty. We reject this argument once again. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982); Sireci v. State, 399 So. 2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Appellant next argues that the trial court erred in finding that two of the aggravating factors found were proven beyond a reasonable doubt. First, we agree that the court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest, section 921.141(5)(e), Florida Statutes (1981), since the evidence failed to establish the requisite proof of an intent to avoid arrest or detection through the killing. No showing was made that the dominant or sole motive for the murder was the elimination of witnesses. Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981 (1982).

We affirm the trial court's finding, however, that appellant's announcement of his intention to commit a murder and the subsequent execution-style shooting sufficiently established a cold, calculated and premeditated murder with no pretense of any moral or legal justification. § 921.141(5)(i), Fla. Stat. (1981). Because the court below found three proper aggravating and no mitigating circumstances, the result it reached, in spite of the error as to one factor, was correct and the death penalty properly imposed. Harmon v. State, 438 So.2d 369 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Finally, appellant raises a number of claims attacking the constitutionality of Florida's capital sentencing statute which he acknowledges this Court has rejected in the past. Ferguson v. State, 417 So.2d 639 (Fla. 1982): Lewis v. State, 398 So.2d 432 (Fla. 1981). We do so again.

Upon our independent review of the evidence as required by Florida Rule of Appellate Procedure 9.140(f), we have found no insufficiency thereof. Finding no reversible error in either the guilt or penalty phases of appellant's trial, we affirm both the conviction and sentence imposed.

It is so ordered.

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., Concur OVERTON, J., Concurs in result only in the conviction, and concurs with the sentence.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY TAYLOR,

Defendant-Appellant.

No. 85-1758

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Slip Opinion

September 8, 1986, Filed

APPEAL-STATEMENT:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, No. CR-85-14-E.

COUNSEL:

John E. Green (William S. Price, United States Attorney, and Stephen J. Koratash, Assistant United States Attorney, with him on the brief), First Assistant United States Attorney, for Plaintiff-Appellee.

Scott W. Reed, for Defendant-Appellant.

OPINION BY: BARRETT

OPINION:

Before BARRETT, McKAY and MOORE, Circuit Judges.

Defendant Appellant, Anthony Taylor, appeals from a jury conviction on two counts of violating 18 U.S.C. § 2113(a) and (d), bank robbery and assault on a person while committing a bank robbery. The jury convicted Taylor of an armed robbery of the Crown Heights Branch of the Local Federal Savings and Loan Association of Oklahoma City, Oklahoma, on January 4, 1985, and an armed robbery of the Communications Federal Credit Union in Oklahoma City, Oklahoma, on December 13, 1984. The district court entered an Order of Judgment and Commitment on May 16, 1985. A Notice of Appeal was filed by Taylor on May 20, 1985. Jurisdiction is vested in this court pursuant to 28 U.S.C. 1291.

Defendant Taylor raises four issues on appeal: (1) whether the district court erred in allowing the testimony of Wayne Nave into evidence in violation of Taylor's

Sixth Amendment right to counsel; (2) whether the district court erred in denying Taylor's Motion to Sever the trial on the counts in the indictment; (3) whether the conduct of the Government's attorney amounted to prosecutorial misconduct requiring a new trial; and (4) whether the conduct of Taylor's trial counsel constituted ineffective assistance of counsel?

I.

A.

Taylor contends that the admission and use of incriminating statements he made to a Government informant about the armed robberies for which he was on trial, violated his Sixth Amendment right to counsel. The Government contends that the informant was not a Government agent and therefore the protections afforded under the Sixth Amendment do not apply. We agree with the Government that under the facts and circumstances of this case, the informant was not a Government agent. We hold that Taylor's Sixth Amendment right to counsel was not violated and the informant's testimony at trial regarding Taylor's incriminating statements was properly admitted.

The relevant facts regarding Taylor's Sixth Amendment claim are not in dispute. Taylor was indicted by a grand jury on February 5, 1985, on two counts of armed robbery. Following his indictment, and while he was awaiting trial in the Oklahoma County Jail, Taylor encountered Wayne Nave with whom he previously had been employed. Nave testified that Taylor initiated a conversation in which he said "that he had some bank robbery charges and that he needed an alibi because he felt

as though he could beat the cases, and that he really wasn't worrying about one of the robberies but he needed a good alibi for January 4th because of the robbery at the local Federal Savings and Loan on Western." (R., Supp. Vol. I, p. 144.)

After this encounter, and at Nave's request, an agent of the Federal Bureau of Investigation (FBI) visited Nave at which time Nave related the substance of Taylor's statements. Taylor was subsequently placed in the same cell with Nave. While they were cellmates, Taylor admitted to Nave that he robbed both financial institutions and related the details of those robberies.

Nave testified on direct and cross-examination that he hoped to get preferential treatment as a result of his cooperating with the Government in this case. According to Nave, however, no promise or guarantee of benefits was made by the Government:

A. [T]here was no plea bargain or anything involved in me giving the information. But I really wanted to know what type of institution I was going to myself and whether or not I would be here of close [sic] to my family.

Like I said, there was no deal made with the government for me to give this information.

Q. Where is your family located?

A. In Los Angeles, California.

Q. Were you hoping that, or did you ask this information, the fact that you're cooperating with the government be passed along to the presentence investigators in your case?

A. Yes.

Q. Were you hoping that this information might be taken into account by the sentencing Judge?

A. Yes, I was, due to the fact that me testifying at this trial.

Q. So, in other words, you're hoping it would help you out.

A. Yes.

Q. You've got three prior bank robberies; is that correct?

A. Yes.

Q. And does the F.B.I. indicate to you, or any other federal official indicate to you whether or not they would pass the information of your cooperation along to the appropriate people?

A. They said that the information would be made note of and it would be passed on. But as far as the guarantee of anything being done as a result of it, there wasn't one.

Q. Because—is it your testimony here today that no promises have been made to you of any type or form?

A. No.

Q. They have not.

A. No.

(Id. at 145-46.)

Taylor's Sixth Amendment claim is based on United States v. Henry, 447 U.S. 264 (1980) and Massiah v. United

States, 377 U.S. 201 (1964). There is no dispute that Taylor's Sixth Amendment right to counsel had attached because Taylor's statements were made to Nave after Taylor was indicted. Kirby v. Illinois, 406 U.S. 682, 688 (1972). There is also no dispute that Taylor properly sets forth the Sixth Amendment issue on appeal under Henry and Massiah: "In the instant case the court is confronted with the question of whether or not Wayne Nave was a government agent who deliberately illicited incriminating statements from Anthony Taylor." (Brief of Appellant, pp. 4-5.) Therefore, in order to find a violation of a defendant's Sixth Amendment right to counsel, a court must find that defendant's statements (1) were made to a Government agent, and (2) were deliberately elicited.

We hold that Nave was not a Government agent. We also hold that the protections of the Sixth Amendment right to counsel enunciated in Massiah and Henry are inapplicable when, after the right to counsel has attached, statements by a defendant are made to an individual who is not an agent for the Government, although he may be a Government informant. This is so regardless of whether the statements were "deliberately elicited." See, e.g., Thomas v. Cox, 708 F.2d 132, 136 (7th Cir.), cert. denied, 464 U.S. 918 (1983); United States v. Metcalfe, 698 F.2d 877, 882-83 (3rd Cir.), cert. denied, 461 U.S. 910 (1983); United States v. Calder, 641 F.2d 76, 78-79 (2d Cir.), cert. denied, 451 U.S. 912 (1981).

We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel. See e.g., Thomas v. Cox, supra at 136. This determination

must be made under the facts and circumstances of each case, considering factors articulated by certain courts which have reviewed the issue of whether an individual is a Government agent. The Supreme Court in Henry implicitly held that a Government informant was an agent because he was paid and acted pursuant to Government instructions. 447 U.S. at 270. In United States v. Calder, supra at 78-79, however, the court held that no agency was created because the Government and defendant's cellmate who acted as a Government informant did not enter into any agreement. Although the cellmate's attorney had discussed with the United States Attorney the possibility that his client might cooperate, no cooperation agreement was entered into until after the incriminating statements were made by defendant. Id. Absent any express or implied agreement with the Government, the court held that Calder's cellmate was not a Government agent and Sixth Amendment protections were therefore not invoked. See also, United States v. Surridge, 687 F.2d 250, 254-55 (8th Cir.), cert. denied, 459 U.S. 1044 (1982).

In United States v. Franklin, 704 F.2d 1183, 1189-90 (10th Cir.), cert. denied, 464 U.S. 845 (1983), we held that under Henry and Massiah, Franklin's right to counsel was not violated when his statement to a Government informant was neither deliberately elicited nor made to a Government agent. After he was arrested, Franklin contacted his former wife and admitted murdering two joggers. Unknown to Franklin, his former wife had consented to having her telephone tapped by the FBI. Because Franklin's former wife was neither paid nor instructed by the Government, factors which the Supreme Court found significant in Henry, supra at 270, she was

not held to have acted as a Government agent. United States v. Franklin, supra.

In United States v. Geittmann, 733 F.2d 1419 (10th Cir. 1984), we considered several factors to conclude that an informant was a Government agent. In Geittmann, the informant was a co-defendant who entered into a cooperation agreement with the Government to make tape recordings of conversations between himself and Geittmann. The informer began taping the conversations at the request of the Government. Government officials led the informant to believe that his cooperation would be to his advantage. Although the informer was not paid for his services, we held that under these circumstances he was a Government agent, id. at 1427, and distinguished the case from one in which independent parties come to the police with unsolicited incriminating information provided by defendants. Id., citing United States v. Franklin, supra.

Under the facts of this case, we hold that Nave was not a Government agent. No agreement was made between Nave and the Government and no benefits accrued to Nave for his cooperation. Any benefits which Nave hoped to obtain were mere expectancies. We decline to infer an agreement between the Government and Nave merely from the placement of Taylor in Nave's cell. In the absence of any express or implied quid pro quo underlying the relationship between Nave and the Government, Thomas v. Cox, supra at 137, and in the absence of any instructions or directions by the Government, we hold that Nave was not a Government agent. Taylor's right to counsel was not violated even if Nave had deliberately elicited incriminating statements from Taylor. Therefore, Nave's testimony regarding Taylor's incrim-

inating statements about the armed robbery was properly admitted in evidence.

I.

B.

Even if Nave were a Government agent who deliberately elicited the incriminating statements from Taylor, Nave's testimony relative to Taylor's admissions of culpability in the charged crimes would have been admissible due to the failure of defense counsel to properly object.

At trial, Taylor's counsel objected to Nave's testimony as follows:

Q. Did you have an occasion to talk with Mr. Taylor about two armed robberies, one at the federal credit union or at Communications Federal Credit Union and another one at a savings and loan on Western?

MR. SHORES: To which we will object, your Honor, being no proper predicate laid. This gentleman apparently gone [sic] to work for the government at that point.

THE COURT: Well, that goes to the weight of the evidence rather than the admissibility of it. Overruled. Go ahead.

Q. (By Mr. Korotash) My question is, did you have a conversation about a couple of bank robberies with Mr. Taylor?

A. Yes, I did.

Q. And where did those conversations take place?

A. In my cell in the Oklahoma County Jail.

Q. Do you recall when that was?

A. It was approximately three weeks ago.

Q. And did Mr. Taylor tell you anything about any bank robberies?

A. He described to me what had taken place in the robberies and more or less how everything developed to this point.

Q. All right. What I want you to do is tell the jury the substance of that conversation. I want you to tell the jury what Mr. Taylor said, to the best of your recollection, in a verbatim way, and what you said. O.K.?

MR. SHORES: Repeat—again, your Honor, we will object to the verbatim of any conversation held by this man while he was under the supervision of the government.

THE COURT: Overruled. Go ahead.

(R., Supp. Vol. I, pp. 146-48.) The above quoted excerpt of the record constitutes the substance of defense counsel's objection at trial to Nave's proffered testimony.

The general rule is that for a party to preserve alleged error for appeal, he must make a timely and proper objection. Under the Federal Rules of Evidence, an objection to a ruling admitting evidence is proper when "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . . ." Fed. R. Evid. 103(a)(1). The specific ground for reversal of an evidentiary ruling on appeal must also be the same as that raised at trial. Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984). Absent a timely and

proper objection, the alleged error will be waived on appeal except when it constitutes plain error resulting in manifest injustice. United States v. Grismore, 546 F.2d 844, 850 (10th Cir. 1976).

In United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983), we held that evidentiary objections can be waived, even if they have a constitutional footing, particularly where the basic factual and legal predicate for them was available. In Dysart, we refused to consider specific allegations of error raised for the first time on appeal even though the defendant made a general objection at trial. Id. at 1255.

We believe that under the circumstances of this case, the defense counsel's objections at trial were improper because they were general and unclear. The district court's ruling even if erroneous did not constitute plain error. Therefore, even if Nave were a Government agent who deliberately elicited the statements from Taylor, we would hold the statements admissible in this case due to counsel's failure to properly object to Nave's testimony.

II.

Taylor contends that the district court erred in denying his Motion to Sever the trial on the two counts of armed robbery. Taylor contends that he was prejudiced by joinder of the two counts because the jury confused and accumulated the evidence and inferred guilt from the count about which the Government had a stronger case.

Rule 8(a) of the Federal Rules of Criminal Procedure provides that "[t]wo or more offenses may be charged in the same indictment or information in a separate count

for each offense if the offenses charged are of the same or similar character. . . ." Taylor concedes that it is within the sound discretion of the district court to order separate trials of counts under Rule 14, of the Federal Rules of Criminal Procedure.

We do not believe the district court abused its discretion in denying Taylor's Motion to Sever. We find nothing in the record to support Taylor's contention that the jury was incapable of properly separating the evidence of each robbery as instructed. In addition, we find nothing in the record to support Taylor's contention that the jury accumulated the evidence or inferred guilt from the stronger count.

III.

Taylor contends that the United States Attorney committed prosecutorial misconduct by his repeated references to the person in the bank as the "defendant" prior to any evidence of identification. Taylor contends that these comments tainted the identification process and infused upon the jury the prosecutor's opinion of Taylor's guilt so as to effectively deny Taylor the presumption of innocence.

Taylor concedes that the prosecutor's use of the term "defendant" in questioning a witness prior to identification was inadvertent. Likewise, the Government acknowledges that the use of the term "defendant" in questioning was an inadvertent and unfortunate mannerism in the prosecutor's presentation. We have held, however, that prosecutorial misconduct is not per se reversible error. We follow the general rule that not all misconduct

requires reversal, but rather, it is only when such conduct can be said to have influenced the verdict that it becomes prejudicial. United States v. Devine, 403 F.2d 93, 96 (10th Cir.), cert. denied, 394 U.S. 1003 (1968).

Assuming, without deciding, that the prosecutor's use of "defendant" during questioning constitutes prosecutorial misconduct, we hold that the prosecutor's statements did not influence the jury's verdict. The in court identification of Taylor was unequivocal. In addition, the evidence linking him to the two crimes was strong. The evidence clearly supports the verdict and any prejudice from the prosecutor's conduct had little, if any, effect on that verdict.

IV.

Taylor contends that he was given ineffective assistance of counsel at trial. Taylor contends that the specific errors made by trial counsel included the following: (1) failure to file pretrial motions in limine to limit the nature and extent of the testimony of Wayne Nave; (2) failure to file motions and make proper objections to pretrial identification procedures; and (3) failure to make strategic decisions during the course of trial.

The test for determining whether assistance of counsel is ineffective is clearly set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984). In Strickland, the Supreme Court held that to establish a case of ineffective assistance of counsel, defendant must show that the alleged errors of counsel were so serious as to deprive defendant of a fair trial whose results were reliable. Id. at 2064.

We agree with the Government that the alleged errors of counsel did not deprive Taylor of a fair trial. We hold

that had counsel performed the way in which Taylor contends was crucial to a fair trial, there would not have been any difference in the evidence offered or the conclusions drawn by the jury.

AFFIRMED.

DISSENT BY: McKAY

DISSENT:

McKAY, Circuit Judge, dissenting:

I agree with parts II, III and IV of the court's opinion. However, I cannot be consistent with the Supreme Court authority and, at the same time, agree with the majority's handling of the Sixth Amendment issue. Therefore, I must respectfully dissent from part I of the opinion and the result obtained in this case.

After the defendant's Sixth Amendment right to counsel had attached, Mr. Nave, who was incarcerated in a detention facility along with the defendant, saw an opportunity to get some help in obtaining a favorable place for his long-term imprisonment. On his own initiative, according to his account, Mr. Nave summoned to his cell federal officials who were preparing the case against the defendant. There he reported a conversation in which the defendant indicated that he was looking for an alibi. Mr. Nave proposed that he would obtain information from the defendant which would be useful to the prosecution in defendant's upcoming trial, if they would inform the probation service, the presentence service and the judge that he was assisting the government on Mr. Taylor's case and speak to the judge about his place of incarceration. In direct exchange for that offer, the government agents agreed to tell the authorities that he had cooperated, but

they would not guarantee that Mr. Nave would be put in a preferred place of incarceration. The government agents, after having reached this understanding with Mr. Nave, placed the defendant in Mr. Nave's cell to facilitate the scheme.

The record is incomplete regarding Mr. Nave's efforts to gather information from the defendant, but we do know that Mr. Nave and the defendant thereupon had "a conversation about a couple of bank robberies . . . ." Record, supp. vol. 1, at 147 (emphasis added). In answer to the question, "And where did those," Mr. Nave replied, "In my cell in the Oklahoma City Jail." Id. (emphasis added). When the prosecutor asked, "What I want you to do is to tell the jury the substance of that conversation," id. (emphasis added), Mr. Nave recited at length the incriminating information on which much of this prosecution rests. Though Mr. Nave said, "I didn't pump him for anything," he added, "The conversation, I never initiated the conversation. The Conversation has brought to me." Id. at 162 (emphasis added). Nowhere in the record is there any indication that the government, which knew that defendant's Sixth Amendment right to counsel had attached, instructed Mr. Nave not to elicit or encourage information in circumvention of that right.

To this whole line of questioning, counsel for defendant objected, saying: "To which we will object, your Honor, as being no proper predicate laid. This gentleman apparently has gone to work for the government at that point." Record, supp. vol. 1, at 147. He further objected, "Repeat—again, your Honor, we will object to the verbatim of any conversation held by this man while

he was under the supervision of the government." While the majority makes much of counsel's alleged failure to raise specifically the issue, in light of the facts in this case, the objection could have been on no ground other than the Sixth Amendment violation. It is not necessary for counsel to give an essay on the basis of the objection. In my view, it was sufficient for him to indicate that he was objecting because Mr. Nave was an agent of the government. See United States v. Cummisky, 728 F.2d 200, 205 (3d Cir. 1984), cert. denied, 105 S.Ct. 1869 (1985).

Because the objection was adequate, two matters remain to be considered. The first concerns the question of the relationship between Mr. Nave and the government when he undertook to have "conversations" with the defendant. In its opinion, the majority focuses its analysis on its determination that the government promised Mr. Nave no consideration for his efforts. The notion of consideration, however, is misplaced in this Sixth Amendment context when discussing agency. It is perfectly clear from reading the facts of such cases as Kuhlmann v. Wilson, 54 O.S.L.W. 4809 (U.S. June 26, 1986); Maine v. Moulton, 106 S.Ct. 477 (1985); United States v. Henry, 447 U.S. 264 (1980); and Massiah v. United States, 377 U.S. 201 (1964), that all that is required for agency in this context is that the informer, for whatever motivation, seek the information from the defendant pursuant to an understanding reached between the informer and the investigating officers. Nothing in the Supreme Court's opinions establishes that whether an informant is an agent turns on whether the police offer the informant consideration. Indeed, according to Moulton, even "knowing exploitation by the State of an opportunity to confront the accused

without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." 106 S.Ct. at 487. The Supreme Court's disregard for archaic notions of consideration is consistent with much of contract law, in which the requirement of consideration has been eliminated. See, e.g., Restatement (Second) of Contracts § 90 (1981); U.C.C. § 2-205 (1977).

In any event, even in a routine contracts case the request for special consideration from the judge about a place of incarceration and a promise to give the good word is more than sufficient consideration either under an academic or a practical view of that notion. Here the government provided such consideration when it agreed to perform a service for the informer and deliberately placed the defendant in his cell in order to carry out this nefarious circumvention of known Sixth Amendment rights. Thus, I conclude that Mr. Nave acted as an agent of the government when he extracted incriminating information from the defendant.

The second matter is determining whether the informer acted only passively or actively in carrying out this scheme to obtain information from the defendant. The only conceivable ground preventing reversal simply on the basis of Moulton is any implications which might be drawn from Kuhlmann v. Wilson, where the Court stated that

a defendant does not make out a violation of [his Sixth Amendment] right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the

defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks. 54 U.S.L.W. at 4815. Kuhlmann makes clear that once the police have set about to deliberately bypass Sixth Amendment rights they may be excused if they carefully instruct their informer to avoid precipitating the incriminating statements and if their informer follows those instructions. In my view, once the government has entered into an agreement that may circumvent a defendant's right to counsel, it has the burden to show by a preponderance of evidence that it instructed the informer to be passive and that he followed those instructions. However, Kuhlmann does not save the government's deliberate circumvention of the defendant's Sixth Amendment rights for two reasons.

First, although the facts in Kuhlmann are somewhat similar to those in this case, it is clear that the Supreme Court relied on 28 U.S.C. § 2254(d) (1982) to reach its factual determination that the informer did not elicit any information from the defendant. That section provides that state court findings of fact are binding on federal courts in habeas corpus actions. In Kuhlmann there was an express state court finding that the informant was instructed only to listen to the defendant, that he followed that instruction, and that the defendant's statements to the informer were spontaneous and unsolicited. However, the facts of our case stand in stark contrast to those judicially established in Kuhlmann. Absolutely no instructions were given to restrain Mr. Nave from soliciting, encouraging or otherwise inducing statements by the defendant. Indeed, all this record reveals is that Mr. Nave

and the defendant had "a conversation" pursuant to the prior understanding with the police that the informer would use the joint celling as an opportunity to gather information. Neither finding nor fact suggests that the informer was instructed to avoid eliciting or encouraging statements.

Second, it is clear that Kuhlmann recognizes that Moulton and its predecessors are binding law. 54 U.S.L.W. at 4815. In Moulton the police did not arrange the meeting between the defendant and the informer. Indeed, the meeting had been arranged before the police approached the informer. The police became aware of the already-planned meeting while reaching an agreement with the informer to have him record conversations with the defendant. Furthermore, in Moulton the government officials instructed the informant "to be himself," "act normal," and "not interrogate" the defendant. 106 S.Ct. at 488 n.14.

Nevertheless, the Court held that the informer's conversation violated the defendant's Sixth Amendment rights. As the Kuhlmann Court described the illegal conduct in Moulton, "[B]ecause of the relationship between the defendant and the informant, the informant's engaging the defendant 'in active conversation about their upcoming trial was certain to elicit' incriminating statements from the defendant . . . . Thus, the informant's participation in this conversation was 'the functional equivalent of interrogation.'" 54 U.S.L.W. at 4815 (citations omitted). The Court further explains in Moulton that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confronta-

tion between the accused and the state agent." 106 S.Ct. at 487.

In my view, the Moulton test has been met. When Mr. Nave engaged the defendant in active conversation designed to obtain incriminating evidence, the defendant's right to counsel was violated. This violation of Sixth Amendment rights is not trivial. The testimony of this informer was central to an otherwise flimsy case. Without that testimony the defendant very likely would have been acquitted.

In conclusion, the agency analysis as employed by the majority will not bear scrutiny. The Moulton line of cases makes abundantly clear that the facts of this case establish a violation of Sixth Amendment rights. An attempt to avoid this violation on the ground that the objection was inadequate simply ignores the fact that the objection could have been based on nothing other than Sixth Amendment grounds and was repeatedly and timely made. Thus, I would reverse the decision of the trial court.

Supreme Court, U.S.
FILED
OCT 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-288

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Petitioner,

vs.

STEPHEN R. MATTATALL,

Respondent

SUPPLEMENTAL BRIEF OF THE PETITIONER

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

Now comes the Petitioner, by its Attorney, and supplements its original Petition and Reply Brief in accordance with Rule 22.6. Petitioner represents that, since the filing of the foregoing documents, three new decisions have been reported that conflict with the decision of the Rhode Island Supreme Court in the instant case. Because such a conflict is one clear ground for the grant of certiorari pursuant to Rule 17.1(c), these decisions are of sufficient significance that the Court should consider them before acting on the Petition.

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS IN CONFLICT WITH TWO RECENT DECISIONS OF THE SUPREME COURT OF FLORIDA AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

In the instant case, the Rhode Island Supreme Court held that the Sixth Amendment required the suppression of the defendant's statements to a private citizen. The trial judge specifically found that the police had played no role in eliciting the statements and had merely listened to the conversation between the defendant and the citizen. Despite the passive nature of the police conduct in this case, the Rhode Island Supreme Court found that this court's decision in Maine v. Moulton, 106 S. Ct. 477 (1985), required suppression.

The instant supplemental memorandum has been filed because of three recent cases that conflict with the decision of the Rhode Island Supreme Court. These cases are in direct conflict with the

result reached in the instant case, and they therefore present this Court with the type of split in authorities that justifies review by certiorari. All of the cases were decided after September 1, 1986, and were therefore unavailable to the parties at the time the petition for certiorari was filed. The cases are discussed infra, and copies of all cases have been appended hereto.

1. DuFourt v. State, No. 65,694 (Florida Supreme Court)(Sept. 4, 1986)(LEXIS slip opinion appended hereto). In DuFour, the defendant alleged that the his Sixth Amendment rights had been violated because a cellmate testified against him at trial. The Florida Supreme Court rejected defendant's Sixth Amendment claim, finding that the cellmate-witness in DuFour's case had voluntarily come to the authorities and offered to give evidence against the defendant. Thus, the confrontation and conversation between DuFour and the informant resulted from no activity by the police. Finding no evidence that the police had actively elicited incriminating statements from the defendant, the court in DuFour found no Sixth Amendment violation.

This result stands in stark contrast to the decision in the instant case. In the case at bar, the record demonstrated that the police were entirely passive listeners to the conversation between the citizen-witness and the defendant. The decision of the Rhode Island Supreme Court is therefore in direct conflict with the decision of the Florida Supreme Court.

2. United States v. Hicks, 798 F.2d 446 (11th Cir. Sept. 3, 1986). In Hicks the Eleventh Circuit rejected the defendant's Sixth Amendment claim. This case involved a cellmate situation similar to the one in DuFour, supra. The court specifically found that the authorities had neither deliberately planted an informant in the cell, nor had they instructed the witness to conduct an interrogation. Finding the government's role to have been totally passive, the Eleventh Circuit rejected the defendant's Sixth Amendment claim. This decision, again, stands in sharp contrast to the result reached by the Rhode Island Supreme Court in the instant case.

3. United States v. Taylor, No. 85-1758 (10th Cir. Sept. 8, 1986)(LEXIS slip opinion appended). In this case a prison inmate approached authorities and reported that the defendant had made incriminating admissions to him. The informant agreed to be placed in a cell with the defendant. During the informant's stay in the cell, the defendant made incriminating admissions that were subsequently used against him. Although this informant testified that he hoped for some special treatment as a result of his conduct, the Tenth Circuit held that he was merely an informant and not an agent of the government. The court reasoned that even if the informant had deliberately elicited incriminating statements, there would be no bar to the evidence gathered because he was not acting as an agent of the prosecution.

In Taylor the police played a far more active role than they did in the instant case. Indeed, the police in the case at bar were entirely passive. Applying the reasoning of Taylor to the instant case, it is clear that the Tenth Circuit and the Rhode Island Supreme Court are in stark conflict.

CONCLUSION

The foregoing recent cases clearly conflict with the decision of the Rhode Island Supreme Court in the case at bar. The existence of a conflict between state and federal courts clearly justifies certiorari in the instant case. R. 17.1(c). For this reasons, and for the reasons already set forth in the Petition and the Reply Brief, this Court should grant a writ of certiorari to review the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

By its Attorneys

ARLENE VIOLET
Attorney General of the
State of Rhode Island

THOMAS MORE DICKINSON
Counsel of Record
Special Assistant Attorney General
72 Pine St.
Providence, RI 02903
(401) 274-4400

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1ST CASE of Level 1 printed in FULL format.

DONALD WILLIAM DUFOUR, Appellant, v. STATE OF FLORIDA, Appellee

No. 65,694

Supreme Court of Florida

Slip Opinion

September 4, 1986

An Appeal from the Circuit Court in and for Orange County, Michael F. Cycmanick, Judge - Case No. CR 82-5467.

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., Concur OVERTON, J., Concurs in result only in the conviction, and concurs with the sentence

James B. Gibson, Public Defender, Brynn Newton, Assistant Public Defender, for Appellant.

Jim Smith, Attorney General, W. Brian Bayly, Assistant Attorney General, for Appellee.

ADKINS

ADKINS, J.

Donald William Dufour appeals his conviction of first-degree murder and the death sentence imposed. We have jurisdiction, article V, section 3 (b) (1), Florida Constitution, and affirm both.

The evidence at trial established the following scenario. State witness Stacey Sigler, appellant's former girlfriend, testified that on the evening of September 4, 1982, the date of the murder, appellant announced his intention to find a homosexual, rob and kill him. He then requested that she drop him off at a nearby bar and await his call. About one hour later, appellant called Sigler and asked her to meet him at his brother's home. Upon her arrival, appellant was going through the trunk of a car she did not recognize, and wearing new jewelry. Both the car and the jewelry belonged to the victim.

Appellant had met the victim in the bar and driven with him to a nearby orange grove. There, appellant robbed the victim and shot him in the head and, from very close range, through the back. Telling Sigler that he had killed a man and left him in an orange grove, he abandoned the victim's car with her help.

According to witness Robert Taylor, a close associate of appellant's, appellant said that he had shot a homosexual from Tennessee in an orange grove with a .25 automatic and taken his car. Taylor, who testified that he had purchased from appellant a piece of the stolen jewelry, helped appellant disassemble a .25 automatic pistol and discard the pieces in a junkyard.

State witness Raymond Ryan, another associate of appellant's, also testified that appellant had told him of the killing, and that appellant had said "anybody hears my voice or sees my face has got to die." Noting appellant's possession of the jewelry, Ryan asked him what he had paid for it. Appellant responded "You

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couldn't afford it. It cost somebody a life." Ryan further testified that he had seen appellant and Taylor dismantle a .25 caliber pistol.

Henry Miller, the final key state's witness, testified as to information acquired from appellant while an inmate in an isolation cell next to appellant's. In return for immunity from several armed robbery charges, Miller testified that appellant had told him of the murder in some detail, and that appellant had attempted to procure through him witness Stacey Sigler's death for $5,000.

At the penalty phase of the trial, Taylor testified over objection to the details of a Mississippi murder for which appellant had been convicted of first-degree murder. The jurors unanimously recommended death and appellant was so sentenced.

Appellant urges that reversal of his conviction is warranted upon a number of grounds. First, he contends that the trial court erred in denying his motion to suppress evidence seized during a search of his residence. The insufficiency of the affidavit supporting the warrant, it is argued, renders the warrant invalid and the fruits of the search inadmissible. An examination of the affidavit, however, leaves little doubt that it amply established the necessary probable cause.

The affidavit, sworn to by an Orange County detective, first indicated that the victim had been murdered with a .25 caliber pistol, and identified certain unique jewelry last seen on the victim's person. The heart of the affidavit centered upon the statement of Raymond Ryan. Ryan stated that appellant informed him that he had killed a person for his gold jewelry, and that he (Ryan) had seen some of this jewelry in the possession of appellant and Robert Taylor. Finally, Ryan indicated that appellant and Taylor "were very close friends and frequently visit each other's apartment, and have committed other crimes together," and that he had seen in Taylor's possession a .25 caliber automatic.

Appellant initially argues that the weaknesses rendering the affidavits insufficient in Yesnes v. State, 440 So.2d 628 (Fla. 1st DCA 1983), and King v. State, 410 So.2d 586 (Fla. 2d DCA 1982), similarly inflict the instant affidavit. We disagree.

A crucial factor distinguishes the affidavits in Yesnes and King from the instant affidavit. In the first two cases, the affidavits were based on the substantially uncorroborated statements of shadowy and unknown confidential informants. The Yesnes court, for instance, applying the "totality of the circumstances" test set forth in Illinois v. Gates, 462 U.S. 213 (1983), found the affadavit "totally lacking in facts sufficient to show the requisite veracity or reliability of the unnamed informants and the information supplied by them." 440 So.2d at 632. Here, the disclosure of the source of the information and the specificity of the facts disclosed, combined with the detective's independent investigation tending to corroborate Ryan's statements, manifestly established the probable cause justifying the search.

The weakness present in King is likewise absent in the instant affidavit. In that case, the confidential informant never indicated when he saw the illegal act -- the defendant's possession of marijuana. The affidavit was therefore insufficient because the offense could have occurred years before; the magistrate was unable to determine any time limitations from the information

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before him.

The instant affidavit, however, dated October 11, 1982, indicated that the victim's body had been discovered on September 6, 1982. Additionally, Ryan alleged that he had seen Taylor in possession of the murder weapon within the past ten days. These factors amply served to provide for the magistrate a time frame in which to conclude that the jewelry and the handgun could well be contained in appellant's apartment.

Appellant lodges his final attack on the affidavit under the authority of Blue v. State, 441 So.2d 165 (Fla. 3d DCA 1983). Such an argument is without merit. Contrary to appellant's assertions, the affidavit under these circumstances required no explicit statement that the jewelry and gun could be located in appellant's apartment. Because the items could reasonable be presumed to be located either on the appellant's person or in his home, it was not arbitrary for the magistrate to make that determination. Bastida v. Henderson, 487 F.2d 860 (5th Cir. 1973); State v. Malone, 288 So.2d 549 (Fla. 1st DCA 1974).

Appellant next argues that the testimony of Richard Miller, a fellow inmate during his incarceration after the murder, should have been suppressed under the authority of United States v. Henry, 447 U.S. 264 (1980). Having reviewed Henry and the Court's more recent pronouncement in Maine v. Moulton, 106 S.Ct. 477 (1985), we find no such impermissible interference with appellant's sixth amendment right to counsel in this case, and reject this claim.

In Henry, the Court found an informant's testimony inadmissible when the informant, the defendant's cellmate, was approached by the police and instructed to "be alert" to any statement the defendant might make. The informant thereby became a government agent for the illicit purpose of obtaining incriminating statements from the accused in the absence of counsel. The Court, in applying Massiah v. United States, 377 U.S. 201 (1964), and finding that Henry's right to counsel had been violated, essentially affirmed that the government would not be permitted to obtain by trickery or stealth incriminating evidence it could not have legitimately obtained. In analyzing whether the government had impermissibly "deliberately elicited" the information from the defendant through its informant, 447 U.S. at 272, the Court focused upon certain elements of the government/informant relationship: the government's initial contacting of the witness, known to have a history as a paid informant, its subsequent instructions to "be alert" to the defendant's statements, and the "contingent fee" arrangement providing for the witnesses' compensation. These elements indicated an orchestrated plan reflective of the government's intention to se the stage for an interference with Henry's right to the assistance of counsel.

In the subsequent Moulton decision, the court found that the state had "knowingly circumvented Moulton's right to have counsel present at a confrontation between Moulton and a police agent," 106 S.Ct. at 490, and so violated the defendant's sixth amendment rights. In spite of the opinion's fairly broad language equating the state's "knowing exploitation . . . of an opportunity to confront the accused without counsel being present" with its "intentional creation of such an opportunity," 106 S.Ct. at 487, the Court found such "knowing exploitation" [illegible] fairly outrageous facts.

First, the individual acting as a government agent, Colson, was no mere cellmate of Moulton's. Rather, he was a co-defendant, facing trial on the same

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charges as Moulton, and apparently aligned with Moulton against the state in the adversarial process. Upon reaching an agreement with the authorities, Colson used this position to uncover incriminating evidence which legitimately lay beyond the authorities' reach.

Secondly, although Colson originally approached the police, it was the latter who conceived and set into motion, albeit with Colson's consent, the flagrant violations of Moulton's rights which followed. The authorities first placed a recording device on Colson's telephone, with instructions to activate the device upon receiving either anonymous phone threats or calls from Moulton. By this means, three conversations were recorded between Colson and Moulton. In the third conversation, Moulton asked Colson to set aside an entire day so that the two of them could meet and plan their defense.

The authorities then obtained Colson's consent to be equipped with a body wire transmitter in order to monitor and record the meeting. Although the police acknowledged at trial their awareness that the two were meeting to discuss the charges on which they both had been indicted, colson was instructed "not to attempt to question [Moulton], just be himself in the conversation." 106 S.Ct. at 481. At the meeting, the two discussed and planned their alibis, and so necessarily detailed the commission of various crimes. Through joking and pretensions of forgetfulness, Colson induced Moulton to repeatedly incrimnate himself. Upon the admission into evidence of several portions of this tape, Moulson was convicted.

We cannot find that either Henry or Moulton compel a finding that appellant's sixth amendment rights have been violated in this case. A review of the facts discloses no "stratagem deliberately designed to elicit an incriminating statement." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982), cert. denied, 459 U.S. 1158 (1983), quoting Malone v. State, 390 So.2d 338, 339 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981). First, Miller approached the authorities on his own initiative, indicating scheming on his part rather than the government's. Bottoson v. State, 443 So.2d 962 (Fla. 1983), cert. denied, 105 S.Ct. 223 (1984); Barfield v. State 402 So.2d 377 (Fla. 1981).

We affirm the vitality of this factor in a sixth amendment right to counsel analysis, noting that the Moulton Court's statement that "the identity of the party who instigated the meeting at which the Government obtained incriminating statements was not decisive or even important to our decisions in Massiah or Henry," 106 S.Ct. at 486-87, refers to the initiation of contact between the accused and the agent, rather than the agent and the government. In Henry, in fact, a crucial element of the state's intentional creation of a situation likely to induce Henry to make incriminating statements involved its initial contacting of the agent and its subsequent instructions to "be alert" to Henry's statements.

Finally, we cannot find the "knowing exploitation" forbidden by Moulton in the absence of more action on the state's behalf tending to indicate a deliberate elicitation of incriminating information. After approaching authorities with information of appellant's planned escape attempt, Miller was neither encouraged nor discouraged from obtaining further information. As we held in Johnson v. State, 438 So.2d 774, 776 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984), "Henry and Malone do not impose on the police an affirmative duty to tell an informer to stop talking and not approach them again nor do they require that informers be segregated from the rest of a jail's population." We

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find no violation of appellant's right to counsel.

In his third argument on appeal, appellant contends that the trial court erred in denying several motions for mistrial. Principally, appellant contends that the prosecutor's mention in his opening argument of Miller's anticipated testimony concerning appellant's escape attempt introduced to the jury irrelevant collateral crime evidence. In light of our holding above as to the admissibility of Miller's testimony, we disagree. The testimony was relevant and admissible as defining the relationship between the state's witness and appellant. Yesbick v. State, 408 So.2d 1083 (Fla. 4th DCA), review denied, 417 So.2d 331 (Fla. 1982). Appellant's several other motions for mistrial similarly lack merit.

Appellant next contends that the trial court abused its discretion in limiting the cross-examination of state witness Robert Taylor. Taylor, appellant's co-defendant in a Mississippi murder prosecution, awaited trial on murder charges in Georgia at the time he testified in appellant's trial. Prior to trial, the state filed several motions in limine seeking to limit the scope of cross-examination of Taylor. The trial court granted two of these motions, prohibiting the defense from asking Taylor any questions in response to which he could be expected to exercise his right against self-incrimination, and from mentioning Taylor's confession to an Orange County sheriff of a number of crimes.

We cannot find that the trial court abused its discretion in either respect. In granting the first motion, the court did not prohibit the defense from impeaching the witness regarding the murder charge. Rather, it prohibited the defense from delving into the facts of a pending case. The jury learned of the charges, and that Taylor hoped to have the state attorney intervene on his behalf at the trial. Because the essence of the witnesses' bias was established through direct and cross-examination, we can find no error in the trial court's "preventing the cross-examination from . . . becoming, under the guise of impeachment, a general attack on the character of the witness." Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).

Similarly, we find the exclusion of the Orange County "confessions" proper. The state's uncontradicted motion established that Taylor "confessed" to a series of unsolved crimes on which the state had insufficient evidence to prosecute, thus clearing the police files in return for a promise not to forward the cases to the state attorney for prosecution. Since the jury was adequately exposed to Taylor's extensive felony record and his tendency to bargain with the state, no need existed for further cross-examination, especially upon such a flimsy foundation.

Appellant next argues that the trial court erred in allowing witness Detective Hansen to read into evidence portions of a statement made by Taylor in 1982, under section 90.801 (2) (b), Florida Statutes (1983), as prior consistent testimony tending to rebut implications of improper motive or recent fabrication. While noting that a witnesses' testimony may not ordinarily be bolstered with corroboration with his own prior consistent statements, Van Gallon v. State, 50 So.2d 882 (Fla. 1951); McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982), we find that the statements in this case fall within the rule's narrowly drafted terms and were properly admitted. First, through its references in cross-examination to Taylor's negotiations with the state attorney's office involving armed robbery charges, the defense adequately

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impeached the witnesses' credibility, raising the specters of both improper motive and recent fabrication. Because, too, the statement in question was made at the time of Taylor's arrest in October 1982, prior to the robbery plea negotiations, Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983), and the actual filing of the Georgia murder charge, the trial court could properly have found that the statement was made prior to the existence of Taylor's motive to fabricate.

In his sixth point on appeal, appellant argues that a mistrial was required after certain comments in the prosecutor's closing argument impermissibly directed the jurors' attention to appellant's failure to take the stand. Fla. R. Crim. P. 3.250. An examination of the statements in question and the context from which they arose, however, leads us to conclude that the statements directed the jury's attention to defense counsel and the evidence presented rather than to appellant's failure to testify. First, in the context of reviewing the bargain that witness Miller had struck with the state in exchange for his testimony, the prosecutor said:

Nobody has come here and said, Mr. Miller's testimony was wrong, or incorrect, or that that was not the deal he was offered.

Far from commenting on appellant's failure to testify, we find that an examination of the statement in context make clear that "Mr. Miller's testimony" refers only to his testimony on his negotiations with law enforcement authorities. As such, the statement merely permissibly commented on the evidence. United States v. Fogg, 652 F.2d 551 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); State v. Bolton, 383 So.2d 924 (Fla. 2d DCA 1980).

Second, we find that the prosecutor's statement to the jury that "[Y]ou haven't, number one, heard any evidence that Donald Dufour had any legal papers in the cell with him" merely rebutted the statement of the defense in its closing argument hinting that witness Miller had access to and could have based his testimony upon appellant's "legal papers." This comment merely referred to the lack of any evidence on the question, White v. State, 377 So.2d 1149 (Fla. 1979), and fell into the category of an "invited response" by the preceding argument of defense counsel concerning the same subject. State v. Mathis, 278 So.2d 280 (Fla. 1973). The trial court thus acted properly in denying these motions for mistrial.

Appellant next argues that the trial court committed reversible error in finding appellant's absence at a pretrial motions hearing voluntary and conducting it in his absence. Although appellant would liken the facts of the instant case to the absence found reversible in Francis v. State, 413 So.2d 1175 (Fla. 1982), we agree with the state that appellant voluntarily absented himself from the proceeding within the terms of Florida Rule of Criminal Procedure 3.180 (b) by embarking on a "hunger strike" culminating in his hospitalization during the hearing. The trial court acted well within its discretion in so ruling.

Next, appellant challenges the trial court's denial of his motions for a continuance. Finding that the requisite showing of a palpable abuse of the court's discretion in so ruling has not been made, Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981), we reject this claim.

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In his ninth point on appeal, appellant contends that the trial court erred in declining to impose sanctions for an alleged violation by the prosecution of the provisions of Florida Rule of Criminal Procedure 3.220 (b) (3). We must first examine the rule's terms to ascertain whether or not any violation occurred below, and, if so, whether any prejudice accrued therefrom to the appellant. James v. State, 453 So.2d 786, 790 (Fla. 1984), cert. denied, 105 S.Ct. 608 (1984).

Rule 3.220 sets forth the respective rights and obligations of the parties concerning discovery in the criminal context. Section (b) (3) of the rule indicates that if the defense has chosen to demand of the state a list of the latter's witnesses, it must, within seven days of the receipt of that list, furnish to the state a list of its expected witnesses. At that point, the rule limits the prosecution's otherwise plenary power to subpoena witnesses and take ex parte testimony as to any violation of the criminal law within its jurisdiction. Able Builders Sanitation Co. v. State, 368 So.2d 1340 (Fla. 3d DCA), dismissed, 373 So.2d 461 (1979); § 27.04, Fla. Stat. (1985). After receiving the defense witness list, the prosecutor may not subpoena any individual on that list without notifying defense counsel and allowing them to attend the interview and examine the witness.

The alleged violation below involved witness Stacey Sigler. Sigler was originally listed on the state's witness list provided to the defense under rule 3.220 (a) (1) (i). The defense merely duplicated this list and submitted it as its own, thereby attempting to force the requirement of notice and the right to attend any meeting between Sigler and the prosecution. Relying on dictum in State v. Barreiro, 432 So.2d 138, 140 n.5 (Fla. 3d DCA 1983), review denied, 441 So.2d 631 (1983), which indicated that "[i]f defense counsel wants to protect against the state's ex parte examination of a witness, he can do so by furnishing the witness's name on his list of defense witnesses," the defense attempted to gain, and was denied, admission to an interview between Sigler and the state's attorney. The defense subsequently moved for dismissal of the indictment or the exclusion of Sigler's testimony as sanctions for the state's behavior in excluding the defense from the interview.

Because we find that no violation of the discovery rules took place below, we approve the trial court's refusal to impose any sanctions. Appellant's construction of the discovery provisions is overbroad and would cut the rule loose from its logical moorings. It is not enough to merely duplicate the list of state's witnesses and thus transform Sigler into a witness "whom the defense counsel expects to call as [a witness] at the trial or hearing." Fla. R. Crim. P. 3.220 (b) (3).

No indication exists that defense counsel, in good faith, intended to call Sigler as a witness. In fact, because Sigler proclaimed ignorance of the crime until the meeting complained of, she apparently lacked the requisite personal knowledge required of a witness. Application of the rule's provisions to the instant facts, as urged by appellant, would frustrate the purpose underlying the rule. When properly applied, rule 3.220 (b) (3) serves the protective purpose of preventing the state from driving an unfair wedge between defense counsel and its key witnesses, through ex parte examination, during sensitive pretrial stages. It is not intended to inhibit the prosecution's power to prepare its case by disallowing all ex parte communication with its witnesses.

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We disapprove of tactics such as those employed by the defense below, because the inclusion of an unwarranted abundance of names on the defense witness list can ultimately only dilute the rule's protective power. The defense is certainly not prohibited from listing as its own those witnesses already listed by the state, but it must do so conscientiously, naming only those it actually expects to call. Otherwise, by attempting to use the rule as a sword, rather than the shield it is intended to be, the defense risks losing any protection which that shield might have offered.

The court additionally rejected the application of rule 3.220 (b) (3) because it found, under the circumstances, that Sigler approached the prosecutor voluntarily. In spite of the initial subpoena, the court found that Sigler had approached the authorities, on the advice of her attorney, in order to negotiate for immunity. Noting that the interview took place two days after the subpoena date, the court found her approach voluntary and the rule inapplicable.

Because we cannot disagree that Sigler was improperly listed as a defense witness, and that her testimony was given voluntarily, we approve of the trial court's refusal to impose sanctions. Mobley v. State, 327 So.2d 900 (Fla. 3d DCA 1976), cert. denied, 341 So.2d 292 (Fla. 1976).

Appellant next argues that the trial court's forcing him to wear leg shackles during the trial led to undue jury prejudice and violated his fundamental right to a fair trial by vitiating his right to a presumption of innocence. Appellant cites Estelle v. Williams, 425 U.S. 501 (1976), for the principle that forcing a defendant to face trial in prison garb impermissibly risks an impairment of his presumption of innocence. In Estelle, however, the Court cited Illinois v. Allen, 397 U.S. 337 (1970), in which the Court upheld the practice of shackling the defendant when necessary to control a contumacious defendant, and noted that in some circumstances physical restraints may further an essential state policy. 425 U.S. at 505.

The court below found the shackles necessary in view of appellant's planned escape attempt from the Orange County jail and his conviction of two murders in Mississippi and subsequent placement on death row. The court explained that while "if he tried to escape he would be unsuccessful . . . someone may be hurt. I don't want that to occur."

The court did attempt to minimize any prejudice accruing to appellant by granting defense counsel's request to place a table in front of the defense counsel's request to place a table in front of the defense table in order to hide the leg shackles. Under these circumstances, and from the lofty stance of appellate review, we will not second-guess the considered decision of the trial judge. We therefore reject appellant's claim.

In his eleventh point on appeal, appellant contends that the trial court erred in denying appellant's motion for mistrial after the jury learned that one juror had received a "strange" phone call and been dismissed. The caller dialed the number, asked if "Mr. Girdner", the juror's husband -- not the juror -- was in, and hung up. Although the phone call could not be linked to the trial in any sense, the trial court, pursuant to defense counsel's urgings, in an "abundance of caution" dismissed the juror from service immediately prior to closing arguments.

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Contrary to the court's instruction, the dismissed juror mentioned the phone call to other members of the jury. The court then called the jury in, explained the circumstances surrounding the call and the juror's dismissal, and assured the jury that the call had no connection with the trial and that their phone numbers were not made public. Finally, the court determined that the jurors had no reservations about their further service.

Determinations of whether substantial justice requires a mistrial and related questions involving juror conduct are both lodged within the sound discretion of the trial court. Doyle v. State, 460 So.2d 353 (Fla. 1984). In light of the tenuous connection between the trial and the call, the court's instruction to the jury was sufficient to cure any taint which may have resulted from the jurors' knowledge of the call. Clark v. State, 443 So.2d 973 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984); State v. Tresvant, 359 So.2d 524 (Fla. 3d DCA 1978), cert. denied, 368 So.2d 375 (1979). We therefore reject appellant's contention.

We now reach appellant's claims as to error in the sentencing portion of the proceeding. First, appellant argues that the trial court erred in denying his proposed special instructions on the jury's sentencing recommendation. We cannot find the court's refusal to deviate from the standard jury instructions improper, ad the court had no duty to instruct the jury that a life sentence could be imposed even in the absence of any mitigating circumstances. In fact, we recently rejected such a contention in Kennedy v. State, 455 So.2d 351 (Fla. 1984), cert. denied, 105 S.Ct. 981 (1985).

Next, appellant argues that the trial court erred in admitting into evidence during the penalty phase extensive details of an earlier murder he had committed in Mississippi. While appellant acknowledges that details of prior felonies involving the use or threat of violence to the person are properly admitted in the penalty phase of a capital trial, and that evidence inadmissible in the guilt phase may be relevant and admissible in evaluating aggravating and mitigating circumstances, Perri v. State, 441 So.2d 606 (Fla. 1983); Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976), he contends that the trial court erred "went too far." We find this argument meritless. Justus v. State, 438 So.2d 358 (Fla. 1983), cert. denied, 465 U.S. 1052 (1984); Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264 (1984).

In his fourteenth point on appeal, appellant argues that the trial court erred in denying his motion to strike death as a possible penalty because the charging indictment had failed to allege the aggravating factors possibly subjecting him to the death penalty. We reject this argument once again. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982); Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Appellant next argues that the trial court erred in finding that two of the aggravating factors found were proven beyond a reasonable doubt. First, we agree that the court erroneously found that the murder had been committed for the purpose of avoiding a lawful arrest, section 921.141 (5) (e), Florida Statutes (1981), since the evidence failed to establish the requisite proof of an intent to avoid arrest or detection through the killing. No showing was made that the dominant or sole motive for the murder was the elimination of witnesses. Bates v. State, 465 So.2d 490 (Fla. 1985); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981 (1982).

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We affirm the trial court's finding, however, that appellant's announcement of his intention to commit a murder and the subsequent execution-style shooting sufficiently established a cold, calculated and premeditated murder with no pretense of any moral or legal justification. § 921.141 (5) (i), Fla. Stat. (1981). Because the court below found three proper aggravating and no mitigating circumstances, the result it reached, in spite of the error as to one factor, was correct and the death penalty properly imposed. Harmon v. State, 438 So.2d 369 (Fla. 1983); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

Finally, appellant raises a number of claims attacking the constitutionality of Florida's capital sentencing statute which he acknowledges this Court has rejected in the past. Ferguson v. State, 417 So.2d 639 (Fla. 1982); Lewis v. State, 398 So.2d 432 (Fla. 1981). We do so again.

Upon our independent review of the evidence as required by Florida Rule of Appellate Procedure 9.140 (f), we have found no insufficiency thereof. Finding no reversible error in either the guilt or penalty phases of appellant's trial, we affirm both the conviction and sentence imposed.

It is so ordered.

McDONALD, C.J., and BOYD, EHRLICH and SHAW, JJ., Concur OVERTON J., Concurs in result only in the conviction, and concurs with the sentence

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2ND CASE of Level 1 printed in FULL format.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANTHONY TAYLOR, Defendant-Appellant

No. 85-1758

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Slip Opinion

September 8, 1986, Filed

APPEAL-STATEMENT:
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, No. CR-85-14-E.

COUNSEL:
John E. Green (William S. Price, United States Attorney, and Stephen J. Koratash, Assistant United States Attorney, with him on the brief), First Assistant United States Attorney, for Plaintiff-Appellee.

Scott W. Reed, for Defendant-Appellant.

OPINIONBY: BARRETT

OPINION:
Before BARRETT, McKAY and MOORE, Circuit Judges.

Defendant Appellant, Anthony Taylor, appeals from a jury conviction on two counts of violating 18 U.S.C. § 2113(a) and (d), bank robbery and assault on a person while committing a bank robbery. The jury convicted Taylor of an armed robbery of the Crown Heights Branch of the Local Federal Savings and Loan Association in Oklahoma City, Oklahoma, on January 4, 1985, and an armed robbery of the Communications Federal Credit Union in Oklahoma City, Oklahoma, on December 13, 1984. The district court entered an Order of Judgment and Commitment on May 16, 1985. A Notice of Appeal was filed by Taylor on May 20, 1985. Jurisdiction is vested in this court pursuant to 28 U.S.C. 1291.

Defendant Taylor raises four issues on appeal: (1) whether the district court erred in allowing the testimony of Wayne Nave into evidence in violation of Taylor's Sixth Amendment right to counsel; (2) whether the district court erred in denying Taylor's Motion to Sever the trial on the counts in the indictment; (3) whether the conduct of the Government's attorney amounted to prosecutorial misconduct requiring a new trial; and (4) whether the conduct of Taylor's trial counsel constituted ineffective assistance of counsel?

I.

A.

Taylor contends that the admission and use of incriminating statements he made to a Government informant about the armed robberies for which he was on trial, violated his Sixth Amendment right to counsel. The Government contends that the informant was not a Government agent and therefore the protections afforded under the Sixth Amendment do not apply. We agree with the Government that under the facts and circumstances of this case, the informant was not a

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Government agent. We hold that Taylor's Sixth Amendment right to counsel was not violated and the informant's testimony at trial regarding Taylor's incriminating statements was properly admitted.

The relevant facts regarding Taylor's Sixth Amendment claim are not in dispute. Taylor was indicted by a grand jury on February 5, 1985, on two counts of armed robbery. Following his indictment, and while he was awaiting trial in the Oklahoma County Jail, Taylor encountered Wayne Nave with whom he previously had been employed. Nave testified that Taylor initiated a conversation in which he said "that he had some bank robbery charges and that he needed an alibi because he felt as though he could beat the cases, and that he really wasn't worrying about one of the robberies but he needed a good alibi for January 4th because of the robbery at the local Federal Savings and Loan on Western." (R., Supp. Vol. I, p. 144.)

After this encounter, and at Nave's request, an agent of the Federal Bureau of Investigation (FBI) visited Nave at which time Nave related the substance of Taylor's statements. Taylor was subsequently placed in the same cell with Nave. While they were cellmates, Taylor admitted to Nave that he robbed both financial institutions and related the details of those robberies.

Nave testified on direct and cross-examination that he hoped to get preferential treatment as a result of his cooperating with the Government in this case. According to Nave, however, no promise or guarantee of benefits was made by the Government:

A. [T]here was no plea bargain or anything involved in me giving the information. But I really wanted to know what type of institution I was going to myself and whether or not I would be here of close [sic] to my family.

Like I said, there was no deal made with the government for me to give this information.

Q Where is your family located?

A In Los Angeles, California.

Q Were you hoping that, or did you ask this information, the fact that you're cooperating with the government be passed along to the presentence investigators in your case?

A Yes.

Q Were you hoping that this information might be taken into account by the sentencing Judge?

A Yes, I was, due to the fact that me testifying at this trial.

Q So, in other words, you're hoping it would help you out.

A Yes.

Q You've got three prior bank robberies; is that correct?

A Yes.

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Q And does the F.B.I. indicate to you, or any other federal official indicate to you whether or not they would pass the information of your cooperation along to the appropriate people?

A They said that the information would be made note of and it would be passed on. But as far as the guarantee of anything being done as a result of it, there wasn't one.

Q Because -- is it your testimony here today that no promises have been made to you of any type or form?

A No.

Q They have not.

A No.

(Id. at 145-46.)

Taylor's Sixth Amendment claim is based on United States v. Henry, 447 U.S. 264 (1980) and Massiah v. United States, 377 U.S. 201 (1964). There is no dispute that Taylor's Sixth Amendment right to counsel had attached because Taylor's statements were made to Nave after Taylor was indicted. Kirby v. Illinois, 406 U.S. 682, 688 (1972). There is also no dispute that Taylor properly sets forth the Sixth Amendment issue on appeal under Henry and Massiah: "In the instant case the court is confronted with the question of whether or not Wayne Nave was a government agent who deliberately illicited incriminating statements from Anthony Taylor." (Brief of Appellant, pp. 4-5.) Therefore, in order to find a violation of a defendant's Sixth Amendment right to counsel, a court must find that defendant's statements (1) were made to a Government agent, and (2) were deliberately elicited.

We hold that Nave was not a Government agent. We also hold that the protections of the Sixth Amendment right to counsel enunciated in Massiah and Henry are inapplicable when, after the right to counsel has attached, statements by a defendant are made to an individual who is not an agent for the Government, although he may be a Government informant. This is so regardless of whether the statements were "deliberately elicited." See, e.g., Thomas v. Cox, 708 F.2d 132, 136 (7th Cir.), cert. denied, 464 U.S. 918 (1983); United States v. Metcalfe, 698 F.2d 877, 882-83 (3rd Cir.), cert. denied, 461 U.S. 910 (1983); United States v. Calder, 641 F.2d 76, 78-79 (2d Cir.), cert. denied, 451 U.S. 912 (1981).

We have been unable to find any bright line test for determining whether an individual is a Government agent for purposes of the Sixth Amendment right to counsel. See e.g., Thomas v. Cox, supra at 136. This determination must be made under the facts and circumstances of each case, considering factors articulated by certain courts which have reviewed the issue of whether an individual is a Government agent. The Supreme Court in Henry implicitly held that a Government informant was an agent because he was paid and acted pursuant to Government instructions. 447 U.S. at 270. In United States v. Calder, supra at 78-79, however, the court held that no agency was created because the Government and defendant's cellmate who acted as a Government informant did not enter into any agreement. Although the cellmate's attorney had discussed with the United

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States Attorney the possibility that his client might cooperate, no cooperation agreement was entered into until after the incriminating statements were made by defendant. Id. Absent any express or implied agreement with the Government, the court held that Calder's cellmate was not a Government agent and Sixth Amendment protections were therefore not invoked. See also, United States v. Surridge, 687 F.2d 250, 254-55 (8th Cir.), cert. denied, 459 U.S. 1044 (1982).

In United States v. Franklin, 704 F.2d 1183, 1189-90 (10th Cir.), cert. denied, 464 U.S. 845 (1983), we held that under Henry and Massiah, Franklin's right to counsel was not violated when his statement to a Government informant was neither deliberately elicited nor made to a Government agent. After he was arrested, Franklin contacted his former wife and admitted murdering two joggers. Unknown to Franklin, his former wife had consented to having her telephone tapped by the FBI. Because Franklin's former wife was neither paid nor instructed by the Government, factors which the Supreme Court found significant in Henry, supra at 270, she was held not to have acted as a Government agent. United States v. Franklin, supra.

In United States v. Geittmann, 733 F.2d 1419 (10th Cir. 1984), we considered several factors to conclude that an informant was a Government agent. In Geittmann, the informant was a co-defendant who entered into a cooperation agreement with the Government to make tape recordings of conversations between himself and Geittmann. The informer began taping the conversations at the request of the Government. Government officials led the informant to believe that his cooperation would be to his advantage. Although the informer was not paid for his services, we held that under these circumstances he was a Government agent, id. at 1427, and distinguished the case from one in which independent parties come to the police with unsolicited incriminating information provided by defendants. Id., citing United States v. Franklin, supra.

Under the facts of this case, we hold that Nave was not a Government agent. No agreement was made between Nave and the Government and no benefits accrued to Nave for his cooperation. Any benefits which Nave hoped to obtain were mere expectancies. We decline to infer an agreement between the Government and Nave merely from the placement of Taylor in Nave's cell. In the absence of any express or implied quid pro quo underlying the relationship between Nave and the Government, Thomas v. Cox, supra at 137, and in the absence of any instructions or directions by the Government, we hold that Nave was not a Government agent. Taylor's right to counsel was not violated even if Nave had deliberately elicited incriminating statements from Taylor. Therefore, Nave's testimony regarding Taylor's incriminating statements about the armed robbery was properly admitted in evidence.

I.

B.

Even if Nave were a Government agent who deliberately elicited the incriminating statements from Taylor, Nave's testimony relative to Taylor's admissions of culpability in the charged crimes would have been admissible due to the failure of defense counsel to properly object.

At trial, Taylor's counsel objected to Nave's testimony as follows:

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Q.: Did you have an occasion to talk with Mr. Taylor about two armed robberies, one at the federal credit union or at Communications Federal Credit Union and another one at a savings and loan on Western?

MR. SHORES: To which we will object, your Honor, being no proper predicate laid. This gentleman apparently gone [sic] to work for the government at that point.

THE COURT: Well, that goes to the weight of the evidence rather than the admissibility of it. Overruled. Go ahead.

Q.: (By Mr. Korotash) My question is, did you have a conversation about a couple of bank robberies with Mr. Taylor?

A.: Yes, I did.

Q.: And where did those conversations take place?

A.: In my cell in the Oklahoma County Jail.

Q.: Do you recall when that was?

A.: It was approximately three weeks ago.

Q.: And did Mr. Taylor tell you anything about any bank robberies?

A.: He described to me what had taken place in the robberies and more or less how everything developed to this point.

Q.: All right. What I want you to do is tell the jury the substance of that conversation. I want you to tell the jury what Mr. Taylor said, to the best of your recollection, in a verbatim way, and what you said. O.K.?

MR. SHORES: Repeat -- again, your Honor, we will object to the verbatim of any conversation held by this man while he was under the supervision of the government.

THE COURT: Overruled. Go ahead.

(R., Supp. Vol. I, pp. 146-48.) The above quoted excerpt of the record constitutes the substance of defense counsel's objection at trial to Nave's proffered testimony.

The general rule is that for a party to preserve alleged error for appeal, he must make a timely and proper objection. Under the Federal Rules of Evidence, an objection to a ruling admitting evidence is proper when "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . .." Fed. R. Evid. 103(a)(1). The specific ground for reversal of an evidentiary ruling on appeal must also be the same as that raised at trial. Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1331 (10th Cir. 1984). Absent a timely and proper objection, the alleged error will be waived on appeal except when it constitutes plain error resulting in manifest injustice. United States v. Grismore, 546 F.2d 844, 850 (10th Cir. 1976).

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In United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983), we held that evidentiary objections can be waived, even if they have a constitutional footing, particularly where the basic factual and legal predicate for them was available. In Dysart, we refused to consider specific allegations of error raised for the first time on appeal even though the defendant made a general objection at trial. Id. at 1255.

We believe that under the circumstances of this case, the defense counsel's objections at trial were improper because they were general and unclear. The district court's ruling even if erroneous did not constitute plain error. Therefore, even if Nave were a Government agent who deliberately elicited the statements from Taylor, we would hold the statements admissible in this case due to counsel's failure to properly object to Nave's testimony.

II.

Taylor contends that the district court erred in denying his Motion to Sever the trial on the two counts of armed robbery. Taylor contends that he was prejudiced by joinder of the two counts because the jury confused and accumulated the evidence and inferred guilt from the count about which the Government had a stronger case.

Rule 8(a) of the Federal Rules of Criminal Procedure provides that "[t]wo or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged are of the same or similar character. . .." Taylor concedes that it is within the sound discretion of the district court to order separate trials of counts under Rule 14, of the Federal Rules of Criminal Procedure.

We do not believe the district court abused its discretion in denying Taylor's Motion to Sever. We find nothing in the record to support Taylor's contention that the jury was incapable of properly separating the evidence of each robbery as instructed. In addition, we find nothing in the record to support Taylor's contention that the jury accumulated the evidence or inferred guilt from the stronger count.

III.

Taylor contends that the United States Attorney committed prosecutorial misconduct by his repeated references to the person in the bank as the "defendant" prior to any evidence of identification. Taylor contends that these comments tainted the identification process and infused upon the jury the prosecutor's opinion of Taylor's guilt so as to effectively deny Taylor the presumption of innocence.

Taylor concedes that the prosecutor's use of the term "defendant" in questioning a witness prior to identification was inadvertent. Likewise, the Government acknowledges that the use of the term "defendant" in questioning was an inadvertent and unfortunate mannerism in the prosecutor's presentation. We have held, however, that prosecutorial misconduct is not per se reversible error. We follow the general rule that not all misconduct requires reversal, but rather, it is only when such conduct can be said to have influenced the verdict that it becomes prejudicial. United States v. Devine, 403 F.2d 93, 96 (10th Cir.), cert. denied, 394 U.S. 1003 (1968).

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Assuming, without deciding, that the prosecutor's use of "defendant" during questioning constitutes prosecutorial misconduct, we hold that the prosecutor's statements did not influence the jury's verdict. The in court identification of Taylor was unequivocal. In addition, the evidence linking him to the two crimes was strong. The evidence clearly supports the verdict and any prejudice from the prosecutor's conduct had little, if any, effect on that verdict.

IV.

Taylor contends that he was given ineffective assistance of counsel at trial. Taylor contends that the specific errors made by trial counsel included the following: (1) failure to file pretrial motions in limine to limit the nature and extent of the testimony of Wayne Nave; (2) failure to file motions and make proper objections to pretrial identification procedures; and (3) failure to make strategic decisions during the course of trial.

The test for determining whether assistance of counsel is ineffective is clearly set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984). In Strickland, the Supreme Court held that to establish a case of ineffective assistance of counsel, defendant must show that the alleged errors of counsel were so serious as to deprive defendant of a fair trial whose results were reliable. Id. at 2064.

We agree with the Government that the alleged errors of counsel did not deprive Taylor of a fair trial. We hold that had counsel performed the way in which Taylor contends was crucial to a fair trial, there would not have been any difference in the evidence offered or the conclusions drawn by the jury.

AFFIRMED.

DISSENTBY: McKAY

DISSENT:
McKAY, Circuit Judge, dissenting:

I agree with parts II, III and IV of the court's opinion. However, I cannot be consistent with the Supreme Court authority and, at the same time, agree with the majority's handling of the Sixth Amendment issue. Therefore, I must respectfully dissent from part I of the opinion and the result obtained in this case.

After the defendant's Sixth Amendment right to counsel had attached, Mr. Nave, who was incarcerated in a detention facility along with the defendant, saw an opportunity to get some help in obtaining a favorable place for his long-term imprisonment. On his own initiative, according to his account, Mr. Nave summoned to his cell federal officials who were preparing the case against the defendant. There he reported a conversation in which the defendant indicated that he was looking for an alibi. Mr. Nave proposed that he would obtain information from the defendant which would be useful to the prosecution in defendant's upcoming trial, if they would inform the probation service, the presentence service and the judge that he was assisting the government on Mr. Taylor's case and speak to the judge about his place of incarceration. In direct exchange for that offer, the government agents agreed to tell the authorities that he had cooperated, but they would not guarantee that Mr. Nave would be put in a preferred place of incarceration. The government agents, after having reached this understanding

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with Mr. Nave, placed the defendant in Mr. Nave's cell to facilitate the scheme.

The record is incomplete regarding Mr. Nave's efforts to gather information from the defendant, but we do know that Mr. Nave and the defendant thereupon had "a conversation about a couple of bank robberies . . . ." Record, supp. vol. 1, at 147 (emphasis added). In answer to the question, "And where did those Mr. Nave replied, "In my cell in the Oklahoma City Jail." Id. (emphasis added). When the prosecutor asked, "What I want you to do is to tell the jury the substance of that conversation," id. (emphasis added), Mr. Nave recited at length the incriminating information on which much of this prosecution rests. Though Mr. Nave said, "I didn't pump him for anything," he added, "The conversation, I never initiated the conversation. The Conversation has brought to me." Id. at 162 (emphasis added). Nowhere in the record is there any indication that the government, which knew that defendant's Sixth Amendment right to counsel had attached, instructed Mr. Nave not to elicit or encourage information in circumvention of that right.

To this whole line of questioning, counsel for defendant objected, saying: "To which we will object, your Honor, as being no proper predicate laid. This gentleman apparently has gone to work for the government at that point." Record, supp. vol. 1, at 147. He further objected, "Repeat -- again, your Honor, we will object to the verbatim of any conversation held by this man while he was under the supervision of the government." While the majority makes much of counsel's alleged failure to raise specifically the issue, in light of the facts in this case, the objection could have been on no ground other than the Sixth Amendment violation. It is not necessary for counsel to give an essay on the basis of the objection. In my view, it was sufficient for him to indicate that he was objecting because Mr. Nave was an agent of the government. See United States v. Cummisky, 728 F.2d 200, 205 (3d Cir. 1984), cert. denied, 105 S. Ct. 1869 (1985).

Because the objection was adequate, two matters remain to be considered. The first concerns the question of the relationship between Mr. Nave and the government when he undertook to have "conversations" with the defendant. In its opinion, the majority focuses its analysis on its determination that the government promised Mr. Nave no consideration for his efforts. The notion of consideration, however, is misplaced in this Sixth Amendment context when discussing agency. It is perfectly clear from reading the facts of such cases as Kuhlmann v. Wilson, 54 U.S.L.W. 4809 (U.S. June 26, 1986); Maine v. Moulton, 106 S. Ct. 477 (1985); United States v. Henry, 447 U.S. 264 (1980); and Massiah v. United States, 377 U.S. 201 (1964), that all that is required for agency in this context is that the informer, for whatever motivation, seek the information from the defendant pursuant to an understanding reached between the informer and the investigating officers. Nothing in the Supreme Court's opinions establishes that whether an informant is an agent turns on whether the police offer the informant consideration. Indeed, according to Moulton, even "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity." 106 S. Ct. at 487. The Supreme Court's disregard for archaic notions of consideration is consistent with much of contract law, in which the requirement of consideration has been eliminated. See, e.g., Restatement (Second) of Contracts § 90 (1981); U.C.C. § 2-205 (1977).

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In any event, even in a routine contracts case the request for special consideration from the judge about a place of incarceration and a promise to give the good word is more than sufficient consideration either under an academic or a practical view of that notion. Here the government provided such consideration when it agreed to perform a service for the informer and deliberately placed the defendant in his cell in order to carry out this nefarious circumvention of known Sixth Amendment rights. Thus, I conclude that Mr. Nave acted as an agent of the government when he extracted incriminating information from the defendant.

The second matter is determining whether the informer acted only passively or actively in carrying out this scheme to obtain information from the defendant. The only conceivable ground preventing reversal simply on the basis of Moulton is any implications which might be drawn from Kuhlmann v. Wilson, where the Court stated that

a defendant does not make out a violation of [his Sixth Amendment] right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

54 U.S.L.W. at 4815. Kuhlmann makes clear that once the police have set about to deliberately bypass Sixth Amendment rights they may be excused if they carefully instruct their informer to avoid precipitating the incriminating statements and if their informer follows those instructions. In my view, once the government has entered into an agreement that may circumvent a defendant's right to counsel, it has the burden to show by a preponderance of evidence that it instructed the informer to be passive and that he followed those instructions. However, Kuhlmann does not save the government's deliberate circumvention of the defendant's Sixth Amendment rights for two reasons.

First, although the facts in Kuhlmann are somewhat similar to those in this case, it is clear that the Supreme Court relied on 28 U.S.C. § 2254(d) (1982) to reach its factual determination that the informer did not elicit any information from the defendant. That section provides that state court findings of fact are binding on federal courts in habeas corpus actions. In Kuhlmann there was an express state court finding that the informant was instructed only to listen to the defendant, that he followed that instruction, and that the defendant's statements to the informer were spontaneous and unsolicited. However, the facts of our case stand in stark contrast to those judicially established in Kuhlmann. Absolutely no instructions were given to restrain Mr. Nave from soliciting, encouraging or otherwise inducing statements by the defendant. Indeed, all this record reveals is that Mr. Nave and the defendant had "a conversation" pursuant to the prior understanding with the police that the informer would use the joint celling as an opportunity to gather information. Neither finding nor fact suggests that the informer was instructed to avoid eliciting or encouraging statements.

Second, it is clear that Kuhlmann recognizes that Moulton and its predecessors are binding law. 54 U.S.L.W. at 4815. In Moulton the police did not arrange the meeting between the defendant and the informer. Indeed, the meeting had been arranged before the police approached the informer. The police became aware of the already-planned meeting while reaching an agreement with the informer to have him record conversations with the defendant. Furthermore, in

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Moulton the government officials instructed the informant "to be himself," "act normal," and "not interrogate" the defendant. 106 S. Ct. at 488 n.14.

Nevertheless, the Court held that the informer's conversation violated the defendant's Sixth Amendment rights. As the Kuhlmann Court described the illegal conduct in Moulton, "[B]ecause of the relationship between the defendant and the informant, the informant's engaging the defendant 'in active conversation about their upcoming trial was certain to elicit' incriminating statements from the defendant . . . . Thus, the informant's participation in this conversation was 'the functional equivalent of interrogation.'" 54 U.S.L.W. at 4815 (citations omitted). The Court further explains in Moulton that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and the state agent." 106 S. Ct. at 487.

In my view, the Moulton test has been met. When Mr. Nave engaged the defendant in active conversation designed to obtain incriminating evidence, the defendant's right to counsel was violated. This violation of Sixth Amendment rights is not trivial. The testimony of this informer was central to an otherwise flimsy case. Without that testimony the defendant very likely would have been acquitted.

In conclusion, the agency analysis as employed by the majority will not bear scrutiny. The Moulton line of cases makes abundantly clear that the facts of this case establish a violation of Sixth Amendment rights. An attempt to avoid this violation on the ground that the objection was inadequate simply ignores the fact that the objection could have been based on nothing other than Sixth Amendment grounds and was repeatedly and timely made. Thus, I would reverse the decision of the trial court.

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